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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

COOPER-JARRETT, INC.; EASTERN EXPRESS, INC.; EASTERN MOTOR DISPATCH, INC.; KRAMER BROS. FREIGHT LINES, INC.; ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.; NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.; REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.; AND THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., *Appellants*

v.

THE UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court for the Western District of Missouri

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri was handed down on February 6, 1964, is reported at 226 F. Supp. 318, and is set forth in Appendix A hereto. The decision of the Interstate Commerce Commission, reported at 314 I.C.C. 5, is set forth as Appendix B hereto.

JURISDICTION

The suit was brought under 28 U.S.C. §§ 1336, 1398, 2284, 2321 through 2325, and 5 U.S.C. § 1009 to set aside and annul a report and order of the Interstate Commerce Commission. The decision of the three-judge District Court (Appendix A) was entered on February 6, 1964, and Notice of Appeal was filed in that court by appellants here on April 6, 1964.

The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *American Trucking Assos.* v. *Frisco Transp. Co.*, 358 U.S. 133 (1958); *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173 (1959); *United States* v. *Drum*, 368 U.S. 370 (1962); and *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

STATUTES INVOLVED

The provisions of the Interstate Commerce Act and of the Elkins Act particularly pertinent to this proceeding are as follows:

National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable

charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(3) of the Interstate Commerce Act, 49 U.S.C. 1(3)

"'* * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *"

Section 1(4) of the Interstate Commerce Act, 49 U.S.C. 1(4)

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, * * *"

Section 1(10) of the Interstate Commerce Act, 49 U.S.C. 1(10)

"(10) The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the

transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part."

Section 1(11) of the Interstate Commerce Act, 49 U.S.C. 1(11)

"(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Section 2 of the Interstate Commerce Act, 49 U.S.C. 2

"That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1)

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company,

firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 6(1) of the Interstate Commerce Act, 49 U.S.C.-6(1)

"That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places, between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules and regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous

places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."

Section 6(7) of the Interstate Commerce Act, 49 U.S.C. 6(7)

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 15(13) of the Interstate Commerce Act, 49 U.S.C. 15(13)

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, and the Commission may, after hearing on a com-

plaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

Section 418 of the Interstate Commerce Act, 49 U.S.C. 1018

"It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities or services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this Act; * * *"

Section 1 of the Elkins Act, 49 U.S.C. 41(1)

"That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The wilful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine * * * and it shall be unlawful for any person, persons, or cor-

poration to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor * * *"

Section 1 of the Elkins Act, 49 U.S.C. 41(2)

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act."

QUESTIONS PRESENTED

1. Whether the court erred in holding that the extent of the jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act is limited by the provisions in tariffs filed by the rail carriers so that any particular service or equipment not embraced within the description of the transportation covered by such tariffs may be provided by the carriers as ancillary services free of regulation while, at the same time and between the same points, identical equipment and services are provided as a part of complete door-to-door transportation subject to regulation.

2. Whether the court erred in holding that the provisions of Sections 1(3) and 1(4) of the Interstate Commerce Act to the effect that the rail carriers must hold themselves out to supply *all* services and *all* facilities in connection with transportation upon reasonable request are *fully* satisfied by tariffs of the rail carriers which hold out complete door-to-door transportation, thereby rendering lawful the maintenance by the rails of concurrent and unrelated charges between the same points which specifically require the shippers to provide certain instrumentalities of transportation and certain service normally included as a part of such transportation.

3. Whether the court erred in holding that the maintenance by the rail carriers of two unrelated sets of rates and charges for transportation, one of which sets covers a complete door-to-door service and the other of which covers a described incomplete service, renders inoperative the provisions of Section 15(13) of the Interstate Commerce Act to the effect that shippers providing a part of their transportation service or

furnishing an instrumentality used therein shall be compensated by just and reasonable allowances duly published in tariff form.

4. Whether the court erred in holding that tariffs which invite discrimination, preference, prejudice, and rebating are not *per se* unlawful under Sections 2, 3, and 6 of the Interstate Commerce Act and under the Elkins Act.

5. Whether the court erred in holding that a highway trailer is not an instrumentality of transportation when transported by the rail carriers under tariffs requiring the shippers to supply said trailers even though, admittedly the rail carriers trip-lease trailers to said shippers for such use and even though, under other tariffs, the same transportation is performed by the rail carriers at rates requiring them to furnish the trailers.

6. Whether the court below erred in holding that Section 418 of the Interstate Commerce Act does not prohibit freight forwarders from furnishing their own services and instrumentalities of line-haul transportation.

STATEMENT

For a number of years the railroads of the nation have performed freight transportation for the public by the physical carriage of laden highway trailers on railroad flatcars. In some instances these public services have been provided pursuant to operating agreements between the railroads and the motor carriers, thereby accomplishing a coordination of the services of the two modes of transport. Such service has been called Plan I TOFC. In other instances the railroads

have provided the service themselves, limited however to points physically served by them. This is Plan II TOFC. In both types of operations the service held out to the public has been a complete one, i.e., transportation from shipper's platform to consignee's door, the carriers providing all necessary facilities, instrumentalities, and services. The rates covering such services were duly published in tariffs filed with the Interstate Commerce Commission, and remain in effect today.

In the early part of 1958, the Eastern Railroads, followed promptly by the Western, filed with the Interstate Commerce Commission new tariffs defining different and truncated "plans" of trailer-on-flatcar transportation and naming charges therefor. Under these new "plans", the transportation services held out to the public and covered by the published charges embrace only the physical movement between railroad yard at origin and railroad yard at destination. Under one of the plans, designated III, the railroads assume no tariff obligation to provide the necessary trailers. Under the other, designated IV, the railroads disavow the obligation to supply either the flatcar or the trailer. Under both, the railroads are purportedly relieved of the obligation to provide any of the terminal services incidental to the complete transportation.

The newly published charges for Plans III and IV partial TOFC services bear no relation whatever to the Plans I and II rates and charges for the complete service. The latter rates and charges vary with the articles shipped and the weight thereof. Under Plans III and IV the published charges apply only for the transportation of a stated maximum quantity of freight of all kinds or descriptions when loaded in not to ex-

ceed two trailers of specified maximum size. Generally speaking, any mixture of commodities in the shipment is permissible so long as no one article constitutes more than 60 percent of the aggregate weight. There is, therefore, no uniform differential between the rates covering the complete service and the charges covering the partial services to reflect reasonable allowances or charges for the service differentiations between the various Plans.

The new tariffs were promptly utilized by freight forwarders under the concept that the two trailerloads of freight constituted a consolidation to make one carload. Said forwarders proceeded to equip themselves to provide their own trailers and their own flatcars, either through ownership or lease, and to take advantage of the Plans III and IV tariffs which named charges far below the level of Plan II. Some of this physical equipment is leased directly from the railroads which provide the transportation under Plans III or IV.

But the railroads do not restrict the leasing of trailers and flatcars to the freight forwarders. Almost from the very inception of Plans III and IV TOFC services the railroads have made a practice of leasing to shippers for use in Plan III those trailers for which the railroad has no loads available under Plan II at the location where said trailers are made empty and for which empty trailers a need exists at some other point. The charges assessed for shipper-use of railroad owned or controlled trailers under lease have never been published in tariff form and the railroads have characterized the furnishing, i.e. leasing of trailers, as "ancillary" service beyond the regulatory reach of the Interstate Commerce Act simply because

beyond the holding out of the railroads as specified in the Plans III and IV tariffs.

In addition to the leasing of trailers and flatcars, the railroads also, either directly or through their subsidiaries and without tariff provision therefor, make a practice of performing "ancillary" terminal services for the Plan III or Plan IV shipper, such as the physical movement of the trailer between rail yard and shipper's platform and the loading and unloading of freight to and from the trailer itself—both functions being designated by the Plans III and IV tariffs as the responsibility of the shipper or receiver.

In a series of ten proceedings before the Commission, the motor carrier industry, including these appellants, challenged the right of the railroads to maintain multiple sets of transportation charges, both published and unpublished, unrelated to each other and yet covering the same service. It was urged that the provisions of Section 15(13) of the Act require that allowances or charges for the allegedly "ancillary" portions of a complete service must be published in tariff form and that if the railroads elect to hold out to the public by tariff a complete door-to-door TOFC service (such as Plan II), the charges for any less inclusive TOFC service must be derived by deduction of published allowances from the charge for the all-inclusive service. The Commission held to the contrary and these appellants brought action in the United States District Court for the Western District of Missouri to set aside as unlawful the Commission's holding.

The United States District Court for the Western District of Missouri sustained the Commission's order

upon the ground that the obligation of the railroads as carriers does not commence until shipments have been physically placed in their possession for transportation and that, therefore, the railroads have the right not only to specify by tariff the point at which that obligation will arise but also to specify concurrently by tariff different quantums of the same service which they will assume the obligation to perform and for which they publish rates and charges differing without regard to the service differences. The court held that the requirements of Sections 1(3), (4), (10), and (11) of the Interstate Commerce Act are fully discharged by the tariff holding out of the complete service and that therefore the requirement of Section 15(13) is not operative with respect to the truncated or partial services for the reason that the holding out of them by specific tariff does not obligate the railroad to provide the "ancillary" services.

Following this reasoning, the provision by the railroads of trailers and terminal services in connection with Plan III or Plan IV transportation was held by the court to be a collateral matter not running to the lawfulness of the tariff publications themselves.

Finally, the court below held that although Section 418 of the Interstate Commerce Act requires that freight forwarders utilize only the instrumentalities of common carriers by railroad, motor vehicle, or water for line-haul transportation, the forwarders are no different than other shippers and are therefore free to provide their own trailers and their own flatcars when utilizing Plan III or Plan IV TOFC transportation as the case may be.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding presents issues of transcendent importance to the regulation of transportation on a nationwide scale. Trailer-on-flatcar service is the fastest growing component of railroad operations and it already gives promise of displacing the boxcar as the transportation instrumentality for high-grade freight. The basis upon which this service is to be held out by the railroads and the manner in which the charges therefor are to be published and assessed are matters of tremendous moment not only to the public but also to the other modes of transportation, particularly the motor carrier industry, which must compete with the trailer-on-flatcar service of the railroads.

If, as the court below has held, the extent of the jurisdiction of the Interstate Commerce Commission can be limited by particular tariffs filed by the railroads to place beyond regulation any particular service or equipment not embraced within the description of the transportation covered by the published rates,[1] then the railroads have it within their own power to specify the extent to which they will subject themselves to regulation. Moreover, if the railroads have the right to provide "ancillary" services at privately negotiated charges not published in a tariff, then they have the power to render futile any regulatory order running to the charges which they do publish.

Even more important to the central purpose of regulation is the fact that under the present practice ap-

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[1] The holding of the court necessarily comes down to the proposition that railroads may by tariff define "transportation" subject to the Interstate Commerce Act regardless of the specific definition in Section 1(3) thereof.

proved not only by the Commission but also by the court below, the railroads are left free to practice the rankest kind of discrimination between and among their patrons. This situation stems from the fact that the incentive for leasing trailers for use in Plan III service arises generally when more trailers are available at a given point than are needed to accommodate the Plan II complete-service shippers. Such trailers are thereupon offered to one or more of such shippers for use in Plan III transportation and, in addition, terminal services are made available with the result that the Plan III partial service is converted into the Plan II complete service but at a total cost to the shipper substantially below that published in the tariffs for the Plan II service itself. The motor carriers assert that the license thus given the railroads to unilaterally grant or withhold the cut-rate service is plainly unlawful. Under the decision below as the motor carriers see it, they are called upon to cope with a competitor which is not only free but is encouraged to utilize the most lethal type of fighting ship.

The court below predicated its approval of the existing practices upon three bases, none of which can withstand analysis. First, the court held that the opinion of the Supreme Court in *Pennsylvania R. Co.* v. *Ohio Public Utilities Commission*, 298 U.S. 170 (1936), and the opinion of the United States Court of Appeals for the Fourth Circuit in *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130 (1944), laid down the legal proposition "that the obligations of the railroads to furnish transportation are limited by the extent of what they hold out to the shipping public in their tariffs, and further that the furnishing of services under the tariffs and as required by the Act

[would] not occur until the flatcars or trailers were placed in the possession of the railroads for the purpose of being transported." (226 F. Supp. at p. 322, Appendix A, pp. 7a-8a) The two cited cases do no such thing.

In the *Ohio Public Utilities* case, coal had been brought by private transportation from a point in Pennsylvania to a cleaning plant in Ohio and, after preparation for shipment, had been tendered to the railroad for transportation to another point in Ohio. The issue in the case was whether the movement by common carrier railroad between points in the State of Ohio was subject to the regulation of the Ohio Public Utilities Commission or the regulation of the Interstate Commerce Commission in view of the fact that the goods had moved from a point in Pennsylvania to an Ohio point in private carriage performed by the owner of the goods. Stated differently, the question was whether the transportation of the goods by railroad wholly within the State of Ohio was, in light of their prior movement into Ohio by private carriage, transportation in interstate commerce as defined in the Interstate Commerce Act. The Court simply held that the interstate movement in private carriage did not make subject to the Interstate Commerce Act the subsequent movement in common carriage within Ohio. Thus, in resolving the specific issue, the Court looked for the point at which the owner of the goods committed them to the flow of commerce via a public carrier and it was in this context that the Court stated that transportation subject to regulation under the Interstate Commerce Act begins when the merchandise has been placed in the possession of a carrier (298 U.S. at page 175).

In contrast the case at bar is concerned with the railroads' continuing obligation to perform "transportation" when called upon, not the point in time when a common carrier obligation with respect to the particular traffic of a particular shipper may arise. That is to say, the railroads *do* hold themselves out to perform TOFC transportation in interstate commerce. Further it is to say that the decision in the *Ohio Public Utilities* case affords utterly no support for the holding of the court below that a railroad is free to publish one rate covering the provision by it of all services and all instrumentalities and another rate, which requires the shipper to supply a part of them but wholly without regard to the cost of the services supplied by the shipper. *And both such rates apply for transportation in interstate commerce.* If the court below is right, then Section 15(13) has been effectively read out of the Act.

In the *Baltimore Steam Packet* case, the issue was whether the steamboat line was an employer "operating any equipment or facility or performing any service in connection with the transportation of passengers or property by railroad." The portion of the opinion upon which both the Commission and the court below relied reads as follows:

> "The phrase 'services in connection with' is used in sections 1(3), 6(7), and 15(13) of the Interstate Commerce Act, 49 U.S.C.A. §§ 1(3), 6(7), 15(13); and, as so used, it has uniformly been construed to mean service rendered while a shipment is in the custody and control of the carrier or service which the carrier is legally obligated to perform. * * *"

It is to be observed that the foregoing statement is in the disjunctive. Services in connection with trans-

portation are not only those performed by the carrier as a part of its physical transportation but also those services which the carrier has a legal duty to perform when called upon. Moreover, with respect to the particular statutes involved in the *Baltimore Steam Packet* case, the decision was effectively overruled by this Court in *Railroad Ret. Bd.* v. *Duquesne Warehouse Co.*, 326 U.S. 446 (1946). There, the question was whether Duquesne, a warehouse owned by a railroad, was performing "transportation" service in loading and unloading freight when such services were not included in the line-haul rates of the rail carrier and the carrier did not offer to perform such services. The Court, while noting that the duty of unloading carload freight ordinarily rests with the shipper or consignee, held that loading and unloading is a transportation service within the meaning of the Interstate Commerce Act and further held that it may be included in a carrier's line-haul charge or a charge may be separately established.[2] The Court then analyzed and disposed of the contention of the appellees in the following language: (326 U.S. at pages 453-454)

> "Duquesne's answer is that the service of loading and unloading is done by it for its customers, *that these services are rendered before railroad transportation has begun or after it has ended, that they are not and cannot be a part of railroad transportation since the tariff of the Pennsylvania forbids it from performing the services.* Duquesne's conclusion is that under such circumstances loading and unloading are not and cannot be a part of railroad transportation. *The ques-*

[2] The plain implication of the Court's statement (326 U.S. at page 453) is that the rail carrier may not offer to perform the service in both ways at the same time.

> *tion, however, is not whether in these cases the service of loading and unloading is being rendered by the Pennsylvania and is, therefore, in fact a part of its transportation service.* It is not whether the affiliate would itself be subject to the Interstate Commerce Act. *It is whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs.* If it is such a service, it is a transportation service within the meaning of the present Acts." (Emphasis added)

Manifestly, the rationale so clearly set forth by the Court in the *Duquesne Warehouse* case disposes of the argument that the furnishing of trailers and the performance of terminal services are "ancillary" and do not constitute "transportation" subject to the Interstate Commerce Act. More importantly, it is eminently clear that the court below erred in holding that the railroads, having established rates for a complete TOFC service, are thereafter free to establish charges for a limited service and to offer privately the additional facilities and services necessary to accomplish a complete service.

It is worthy of note that Judge Parker in the *Baltimore Steam Packet* case observed that the purpose of the Hepburn Act of 1906 [34 Stat. 584] which enlarged the definition of "transportation" in the Act to its present form, was "to include all services rendered in connection with transportation by carriers and thus prevent overcharges under the pretext of performing additional services." (144 F. 2d at page 133). *A fortiori*, the definition also precludes undercharges based upon the pretext of performing fewer services.

Also noted by Judge Parker in the *Baltimore Steam Packet* case was the opinion of this Court in *Cleve-*

land, C.C. & St. L. R. Co. v. *Dettlebach*, 239 U.S. 588 (1916), interpreting the Hepburn Act as placing within the meaning of the word "transportation" a great deal more than a carrier might itself elect to do if permitted by tariff to limit its legal obligation to serve. Respecting this matter, the Supreme Court said in the *Dettlebach* case at page 594 of its opinion:

> "* * * it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term 'transportation,' and subjected to the provisions of the act respecting reasonable rates and the like."

The judgment of the court below would permit the railroads to do the very things the Supreme Court said Congress intended to prevent.

The second and third bases upon which the court below sustained the Commission's holding that there had been no departure from the requirements of the Interstate Commerce Act respecting the obligation of the railroads to serve, are themselves demonstrative of their own invalidity. The court said that the limitation by the railroads of their obligations in the Plans III and IV tariffs is of no consequence because the rails do hold out a Plan of complete service between the same points and that, in any event, such limitation is not unreasonable inasmuch as no shipper has complained. The court utterly disregarded the central

purpose of the Interstate Commerce Act, namely, that the carriers are required to serve all shippers without discrimination and, to that end, are required to publish tariffs in conformity with the provisions of the Act itself. If the carriers are to be permitted to escape the effect of those provisions upon the ground that they have not erred until some shipper complains, there is no need to publish tariffs at all.

Both the Commission and the court below point out that there is nothing in the Interstate Commerce Act which would prevent a railroad from maintaining both a complete and a partial service, assessing lower charges for the latter. But this is not and never has been an issue in these proceedings. Neither is there involved here any question as to the right of a shipper to supply, at his own option, one or more of the instrumentalities or services which are components of the total transportation he needs. What is really at issue in all of these cases is the right of a railroad to limit by tariff its obligation to transport while also and simultaneously by tariff publication accepting the complete obligation, thereby clothing itself with the opportunity to discriminate between and among its patrons. The court below has held unequivocally that the tariff device here adopted by the railroads for the accomplishment of these goals is not forbidden by the language of the Interstate Commerce Act even though, (a) transportation is clearly defined in Section 1(3), (b) the obligation to furnish transportation, as defined, upon reasonable request is squarely imposed by Section 1(4), (c) the requirement to publish charges for transportation and to collect those charges and none other is plainly stated in Section 6, and (d) the method for compensating shippers which provide

transportation equipment or service is explicitly set forth in Section 15(13).

From what has already been said, it is apparent that the transcendent public interest in the issues here presented lies in the question of whether the operations of common carriers must conform to the Interstate Commerce Act or whether the Commission and the courts may lawfully modify the Act through interpretation to fit transportation operations as carriers decide from time to time that they should be conducted. This fundamental question is equally apparent in the holding of the court below that Section 418 of the Act does not preclude freight forwarders from providing their own equipment for line-haul transportation. The language of the Act could hardly be more plain, yet the court felt free to disregard it, saying (226 F. Supp. at page 326, Appendix A, pages 15a-16a):

> "We see no distinction, insofar as the law is concerned, between the well known and recognized policy of ownership of the transportation facilities, i.e., boxcars, freight cars, refrigerator cars, oil tank cars and other types of cars or by private owners and shippers and transported in line-haul by the carrier, and the Plan IV where the forwarder supplies the flatcar either by lease from private owners of flatcars or from the railroad company itself, if the rates and tariffs are properly published and are available and open to all shippers to make use of such facilities for the recognized tariffs that are charged by the carrier."

The distinction which the court failed "to see" is that the law *permits* an ordinary shipper to furnish transportation equipment but *prohibits* a freight forwarder from so doing.

Both the court below and the Interstate Commerce Commission, in approving the method selected by the

railroads for the publishing of charges for partial TOFC service and the furnishing, in addition thereto, of equipment and service which in combination produce an aggregate service that is the equal of complete service offered at other and unrelated rates, have departed from the clear requirements of law and have charted the course for wholesale avoidance of the Congressional purpose underlying the Interstate Commerce Act as so clearly set forth in the National Transportation Policy.

CONCLUSION

The questions presented by this appeal are substantial and are of sufficient public importance as to require plenary consideration with briefs and oral argument for their resolution.

Respectfully submitted,

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June 5, 1964

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Filed Feb. 6, 1964—J. C. Truman, Clerk
By E. J. Clarke, Deputy Clerk

No. 13469-3

COOPER-JARRETT, INC., et al., *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, et al., *Defendants*,

BEFORE RIDGE, Circuit Judge, GIBSON, Chief District Judge, and DUNCAN, District Judge.

DUNCAN, District Judge.

This action was brought by the plaintiffs under §§ 1336, 1398, 2284 and 2321 through 2325 Title 28, U.S.C.A. to set aside and enjoin the order of the Interstate Commerce Commission, No. 32533, June 19, 1961, cited as *Eastern Central Motor Carriers Association* v. *Baltimore and Ohio R. R., et al.*, 314 I.C.C. 5.

The plaintiffs, Cooper-Jarrett, Inc., Eastern Express, Inc., Eastern Motor Dispatch, Inc., Cramer Brothers Freight Lines, Inc., are common carriers, engaged in motor transportation.

Eastern Central Carriers Assoc., Inc., The Rocky Mountain Motor Bureau, Inc., National Motor Freight Traffic Assoc., Inc., and the Regular Common Carrier Conference, are regular common carriers or associations of which substantially all of the motor transport carriers subject to the jurisdiction of the I.C.C. are members, and appeared as parties in all of the proceedings before the Commission.

Upon order of this Court, the following parties were allowed to intervene in support of the Commission's report or order: The Eastern Railroads, The Transcontinental Railroads (representing substantially all rail interests using the protested rates), the National Industrial Traffic League, six freight forwarding companies and the Freight Forwarding Institute, and various shippers: (Swift and Co., Merck and Co., Manufacturers Chemists Association, and the Drug and Toilet Preparation Conference.) The intervenors are common carriers by railroad, freight forwarders, and shippers engaged in shipping freight in Interstate Commerce.

Pursuant to §§ 2321-2325, Title 28 U.S.C.A. this review was heard before this three-judge court on the 6th day of December, 1963.

The controversy involves the rates promulgated by the rail carriers in the transportation of freight under what is known as trailer on flat car "TOFC" or "Piggy Back" service.

The Commission ruled[1] that:

> "(1) the rail rates and charges on loaded or empty trailers and containers, moving in Plan III and Plan IV TOFC service and the rules in connection therewith, here under investigation, and (2) the assailed freight-forwarder volume commodity rates, are law-

[1] Two members separately concurring and one dissenting.

ful, or not shown to be unlawful, as the case may be." (p. 50 of 314 I.C.C.)

Prior to 1958, five plans were adopted by the railroads for the transportation of freight under the so-called "piggy back" or "TOFC" method. The following explanation of the various plans was given by the Interstate Commerce Commission at 314 I.C.C. 8, 9:

> "Under Plan I, the railroads transport loaded motor common carrier highway trailers on flatcars in line-haul movement between terminals, ramp-to-ramp, in substituted rail for motor service. The freight moves on motor-carrier billing, and the rail service is not held out to the public. The railroad compensation, under contractual arrangements, is based on a division of the motor-carrier charges and on the gross weight of the trailers and lading.
>
> "Under Plan II the railroad provides the trailer and flatcar and performs pickup and delivery within rail terminal areas, and loading and unloading to and from the flatcar. In general, the rail rates for this service are the same as the motor common carrier rates.
>
> "Under Plan III service, the shipper provides the trailers (or containers) which he owns or leases. He delivers the loaded trailers to the rail loading ramp and arranges for their movement from the unloading ramp at the delivery point. The railroad loads the trailers onto the flatcar at origin, performs the line-haul service, and unloads the trailers from the flatcars at the rail terminal. The railroad charge is stated in amounts per flatcar, a charge of the same amount applying in the opposite direction, whether the trailers are empty or loaded. Plan III thus eliminates pickup and delivery expense, acquisition, maintenance, and depreciation charges for trailers, and

all empty return mileage. The railroad pays no rental charge for the trailers, and no refrigeration, ventilation, or other protective services are furnished.

"The plan III rates and charges contemplate the handling of two loaded or empty trailers on one rail car, and they will not apply when more than 60 percent of the total weight of the lading consists of any one article. • • • •

"The service under plan IV is the same as plan III, except that the shipper provides the flatcar in addition to the container or trailer. The flatcar must be fitted with the necessary tiedown devices, approved by the railroad. Loading and securing to flatcars, and unloading and placement are at the shipper's expense. (This plan is the one used extensively by freight forwarders).

"Plan V, (not now in use), contemplates joint motor-carrier-rail service." (Pars added).

Plaintiffs here are attacking only the rates and services as approved by the I.C.C. under Plans III and IV, ante. Plan III rates and services are not in effect by the Western railroads. We see no reason why we should set out in greater detail the rates which are here in controversy. They are fully set out, described and defined in the Commission's report. 314 I.C.C. 10, 11, 12.

It is sufficient to say that plaintiffs seek to have us review the lawfulness of the rates, charges, regulations and practices of the carriers, and the order of the Commission as a whole, from the premise that the same constitute a "new method" of rate making and tariff approval by the Commission which plaintiffs assert is violative of Sections 1(3)(4)(10) and (11) of the I.C.C. Act, supra. From that position, they raise six issues, and ask us to decide whether or not:

"1. The railroads have the statutory obligation to furnish the cars, other vehicles, and all instrumentalities and facilities of shipment or carriage, and all services in connection with the handling of property transported.

"2. Compensation to shippers for furnishing instrumentalities used in or services connected with transportation other than as prescribed in the Interstate Commerce Act is unlawful.

"3. The practices of the railroads under Plans III and IV result in violations of the Elkins Act and Sections 2, 3 and 6 of the Interstate Commerce Act.

"4. The Plans III and IV rates and charges are unreasonably low and constitute an unfair and destructive competitive practice.

"5. Plans III and IV rates and charges violate requirement that rates reflect just and reasonable classifications of property.

"6. Plans III and IV rates require a violation of Section 418 of the Interstate Commerce Act when utilized by freight forwarders."

and that we make affirmative declaration as to such matter, and adjudicate that the rates and tariff provisions here to be considered are unlawful per se.

We note initially that the plaintiffs, on oral argument before this court have abandoned their contention that plans III and IV violate the requirement of the Interstate Commerce Act as to reasonable classifications of property. Hence we need not make any determination as to issue numbered (5) above.

In oral arguments, counsel for the plaintiffs also stated:

"• • • we don't think that there is anything here for Your Honors to decide as to the wisdom of the

practices of the railroads with respect to the rates with respect to this business of trying to compete with private carriers.

Second, we have never challenged and we do not here challenge the right of the railroads to provide the physical trailer-on-flatcar service under Plans 3 or 4 or any other plan. Physically, there can be no question that the railroads have the right to transport trailers on flatcars.

Third, we do not challenge the right of the shippers to provide facilities and services for themselves, when they utilize a part of the rail services in the transportation of trailers on flatcars.

What is at issue, however, is the right of the railroads themselves to specify by tariffs the extent of service which they will provide as common carriers under the Interstate Commerce Act, and thereby the extent of the service which they provide to the public and which is to be subject to the Interstate Commerce Act.

Specifically, we ask the Court to review and to appraise the Commission's decision in this case in the light of the requirements by the Interstate Commerce Act that the railroads shall provide transportation to the public on reasonable request, and that that transportation in interstate commerce shall cover all services, all charges, all allowances by tariff publication. Also the issue in the case is the right of the forwarders to provide their own railroad cars." [Trans. p. 6].

Plaintiffs' oral argument made before this court has clarified and limited the presentation of issues raised by them in their briefs. This court's determination is made upon consideration of both oral argument and the printed briefs in the record.

Plaintiffs first contention is that under §§ 1(3), 1(4), 1(10) and 1(11)[2] of the Interstate Commerce Act, the railroads must furnish all instrumentalities of transportation, and that in not providing flatcars and trucks under Plans III and IV at the tariffs published by them, the railroads violate the Act, supra.

The Commission held (at 314 I.C.C. 47) that the obligations of the railroads to furnish transportation are limited by the extent of what they hold out to the shipping public in their tariffs, and further that the furnishing of services under the tariffs and as required by the Act did not occur until the flatcars or trailers were placed

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[2] "Section 1 (4):

'It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor * * *.'

Section 1 (3):

' * * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the * * * handling of property transported. * * * '

Section 1 (11):

'It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.'

Section 1 (10):

'The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.' "

in the possession of the railroad for the purpose of being transported. In the light of *Pennsylvania R. Co.* v. *Ohio Public Utilities Comm.* 298 U.S. 170, 56 S. C. 687, 80 L. E. 1130 (1936); *Walling* v. *Baltimore Steam Packet Company*, 144 F. 2d 130 (4th Cir. 1944), the court can only agree with the Commission's determination of law respecting that matter.

The plaintiffs' contention, as we understand it, is not that the shippers *cannot* furnish their own instrumentalities, but that under the law the *rails must hold out only the full service* to the shippers, and if the shippers choose to furnish part of the facilities of transportation, this must be taken care of by published tariff rate allowance.

In the first place, we hold trailers, when used in Plan III service, to be containers rather than instrumentalities of transportation, and thus the above argument can only affect Plan IV. *Allowances For Use of Trailers*, 299 I.C.C. 513; *Forwarder Volume Rates, Chicago and New York*, 308 I.C.C. 455; *Eastern Express, Inc.* v. *U. S. et al.*, 198 F. Supp. 256 (S.D. Ind. 1961), affirmed 369 U.S. 37, 82 S. C. 640, 7 L. Ed. 2d 548 (1961).

Secondly, the basic contention of plaintiffs is that Plan II service is coextensive with III and IV service in all protested instances. Therefore, all the foregoing aside, the railroads *are* holding out all instrumentalities to the shipping public under Plan II, even under the plaintiffs' contention or construction. The fact that a partial service is offered at a lower rate does nothing to impinge the fact that a *complete service is offered.*

Third, there is an internal qualification in the portion of the Act cited by the plaintiffs. That is, that the rails must offer these instrumentalities and services "upon reasonable request". There is no indication whatever that the rails have not furnished all services reasonably requested by the shippers, and it is to be noted that shippers, rather than protesting the plans, have intervened on their be-

half. We must conclude that the plaintiffs' first contention is groundless.

Quoting further from the oral argument of counsel for the plaintiffs:

> "The principal issue before Your Honors in this case is the manner in which the trailer-on-flatcar charges of the railroads shall be published. That includes the issue of whether they shall even be published at all.
>
> Now, in its initial phases this case before the Interstate Commerce Commission was presented or defended, rather, by the railroads on the ground that they had a right, where a shipper provided his trailer, to put a rate in just for that, and we said no, that so long as you are holding out your services as required by the statute for the complete service, there is only one manner whereby you can compensate the shipper for the provision of a part of the service which the law makes it your obligation to provide, and that is Section 15(13) of the Interstate Commerce Act."

Counsel further stated:

> "Now, there is our grievance. We say that there is no other way. *If the railroads want to hold out the complete service, they must make provision for this lesser service only by an allowance.*" [Emphasis supplied]

Section 15(13) in part provides:

> "If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable, ..."

The Hearing Examiner who presided at eight of the ten original proceedings in this rate matter, found that Plan III and IV rates violated § 15(13) in his proposed report. The Commission rejected the examiner's findings on this point at page 45 of its report, stating:

> "In substance, the Examiner concluded in the proposed report in the eastern and western cases that the railroads, having established Plan II rates and charges for a complete, door-to-door TOFC service, may provide lesser services only by publishing tariff allowances to shippers who furnish a part of the instrumentalities and services which the carriers otherwise are obligated to furnish. * * * *
>
> We are not in agreement with that position. * * * The fact that rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a lower rate. Nor when that is done, can it be said that the carrier is 'obligated' to do more than it has offered to do for the lower rate where such offer at the latter rate is accepted by the shipper. With respect to allowances' obviously none can be made to the shipper for performing a service the avoidance of which is the consideration for the lower rate."

We can find no illegality in such declarations as to rate making and approval thereof by the I.C.C. as plaintiffs here contend. The requirements of the Act are that the carrier must hold itself out to furnish the facilities of transportation. It is not required to furnish facilities to pick up and deliver, unless it holds itself out to do so. When it does so, it may make a reasonable charge therefor. Such additional service for such additional charge then becomes available to all who request it and are willing to pay for it.

If the carrier wishes to initiate a lesser service for a lesser price, it may do so. We see no violation of the law

if the carrier publishes a lower rate for carrying freight that is brought to it by the shipper. This is not the rendering of any service under the Act connected with the transportation so far as the carrier is concerned. Its responsibility as a carrier under § 15(13) of the Interstate Commerce Act, begins when the lading is delivered to it for transportation. *Pennsylvania R. Co.* v. *Ohio Public Utilities Comm. supra.*

Under Plan II the carrier's responsibility begins when it receives the freight at the shipper's dock or place of business.

Under Plan III the carrier's responsibility does not begin until the freight is delivered to it by the shipper, and such delivery by the shipper is not a part of the transportation covered by the Act.

Under Plan IV the railroad's obligation to furnish transportation under the Act does not begin until the flat cars are delivered to the railroad to be put into the line-haul operation. Thus the provisions for allowances under § 15(13) do not have application, because the services in question are not within the scope of the Act for this purpose.

Approaching the problem from another viewpoint, if there were only Plan II tariffs, then, of course, services performed by the shipper would have to be considered by way of published allowances credited against the Plan II tariff, but in the presence of Plan III and IV tariffs, the question of allowances has no pertinency. As was stated at page 21 of the Transcontinental Railroads' brief in the case at bar:

> "In short, whether an allowance may be made to a shipper is determined by the scope of the tariff involved."

§ 15(13) is not intended to require allowances unless the service provided by the shipper is within the tariff in use

in the instance under consideration. We therefore must rule against the plaintiffs in regard to their second contention.

Plaintiffs' third contention is that the railroads practices under Plans III and IV are violative of the Elkins Act, 49 U.S.C.A. 41-43, which makes it unlawful to offer, grant, give, solicit, accept or receive any rebate, concession or discrimination and provides a penalty for so doing.

They further contend that §§ 2, 3 and 6 of the Interstate Commerce Act are violated. (These sections forbid rate discrimination by rebate, special rates, etc.; prohibit undue preferences or prejudices in regard to shippers, and make it unlawful for carriers to ship at unpublished rates.)

The answer to that contention is that there is nothing in either of these *plans* which provide for, or even suggest any "rebate, concession or discrimination". The types of service offered are available to all who wish to avail themselves of such services, and the rates are fixed and published for the type of service selected by the shipper.

Whether or not there are actually unlawful practices being indulged in in connection with Plans III and IV TOFC, really has no bearing upon the lawfulness of the plans themselves. If the railroads rebate, discriminate, or indulge in unlawful preferences, or in any other way violate the Elkins or Interstate Commerce Acts, then they certainly are subject to censure and prosecution for those violations.

Such practices, however, as the railroads were shown to be engaging in, (i.e. the leasing of trailers and flatcars), are not violative of these Acts on their face, and since there is nothing in the record to prove that these leasing arrangements were used unlawfully, the Commission's decision must be upheld.

Plans III and IV rates and charges do not violate the Elkins Act or §§ 2, 3 or 6 of the Interstate Commerce Act, nor were the railroads' practices under Plans III and IV shown to be unlawful on the record before this court.

Plaintiffs' fourth contention is that Plan III and IV TOFC rates are unreasonably low and constitute a destructive competitive practice. The basis for this contention is that the rates in question were found to be below the vast majority of boxcar and plan II rates. Plaintiffs' contention is that the unreasonable lowness is injurious to the railroads and destructive of the motor freight industry.

The Commission found that the rates were not unreasonably low. The rates were found to exceed out-of-pocket costs of the railroads, and to provide a substantial contribution to the rails' overhead burden. The Commission further found that under § 15(13) of the Act, rates of a carrier should not be held to a particular level merely to protect another mode of transportation. In addition, the Commission held that the rates were not shown to be destructive of the motor carrier industry or individual motor carriers based on the testimony and evidence under consideration in that proceeding. See 314 I.C.C. 5, l. c. 50.

There is no question but that the plans which are in dispute in the instant case have enabled the railroads to stem somewhat the flow of traffic away from the rails, and have given the rail lines some revitalization.

The tables provided by the I.C.C. as an appendix to its opinion (314 I.C.C. 56-64) demonstrate that the rates in all cases exceed out-of-pocket expenses, and in some instances, exceed fully distributed costs. Thus under the oft repeated test enunciated in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475 (1945), the rates are com-

pensatory and cannot be said to be destructive merely because of their lowness.

The Commission's statement that rates of a carrier should not be held up to a particular level to protect another mode of transportation is also well grounded. In *New York, New Haven and Hartford R. Co.* v. *U. S.*, 199 F. Supp. 635, l. c. 641, (D.C. Conn. 1961), it was stated:

> "Apparently the Commission thought that any rate competition which threatens the continued existence of a competitor it had the power to prevent as a 'destructive competitive practice' irrespective of whether the challenged rates were compensatory to the proponent thereof, or whether the mode of the contesting competitor was a lower cost mode than that of the proponent. This, we hold was an erroneous interpretation of the act as amended.
>
> Even before 1958, it would have been erroneous to hold that irrespective of other factors, rates were unlawful merely because they would destroy carriers operating under different modes of transportation. In Schaffer Transfer Co. v. U. S., 355 U. S. 83, 91, 78 S. Ct. 173, 178, 2 L. Ed. 2d. 117 (1957), it was said that 'the ability of one mode of transportation to operate with a rate lower than competing types is precisely the sort of inherent advantage that the congressional policy requires the Commission to recognize.'"

We cannot say that there was not substantial evidence to justify the Commission's finding that the rates in question were not destructive of either individual motor carriers or the motor carrier industry as a whole, as a matter of fact.

Therefore, based on the foregoing, we must conclude that the Commission was correct in deciding that the rates were not unreasonably low or destructive of competition, either in law, or in fact.

The last contention of the plaintiffs is that the use of Plans III and IV by the freight forwarders is violative of § 418 of the Interstate Commerce Act, 49 U.S.C.A. 1018. In pertinent part, § 418 is as follows:

> "It shall be unlawful, except in the performance within terminal areas of transfer, collection or delivery services, for freight forwarders to employ or utilize the instrumentalities or services of any carriers other than common carriers by railroad, motor vehicle or water, subject to this act * * * *."

The plaintiffs have maintained that the providing of flatcars and trailers by freight forwarders under the plans in question violates this section. Initially, we note that as to Plan III, this argument was disposed of in *Eastern Express, Inc.* v. *U. S., et al.*, 198 F. Supp. 256 (S.D. Ind. 1961) affirmed 369 U.S. 37, 82 S. C. 640, 7 L. Ed. 548, wherein it was held:

> "With respect to the plaintiffs' argument that the assailed freight forwarder service is in derogation of Section 418 of the Interstate Commerce Act, in view of the reasons stated in the Commission's initial report in these proceedings, which have been stated heretofore, we concur in the conclusion of the Commission that the rail shipments by the freight forwarders of their trailers, loaded or empty under the rail Plan III piggyback rates published by the railroads, and available for the use of the shipping public, are not unlawful under said section."

The only issue that might possibly remain in contention in the case at bar is that the furnishing of flatcars under Plan IV by freight forwarders is unlawful.

We see no distinction, insofar as the law is concerned, between the well known and recognized policy of ownership of the transportation facilties, i.e., boxcars, freight

cars, refrigerator cars, oil tank cars and other types of cars or by private owners and shippers and transported in line-haul by the carrier, and the Plan IV where the forwarder supplies the flatcar either by lease from private owners of flatcars or from the railroad company itself, if the rates and tariffs are properly published and are available and open to all shippers to make use of such facilities for the recognized tariffs that are charged by the carrier.

As the Commission stated in *Forwarder Volume Commodity Rates Chicago and New York*, 308 I.C.C. 455, l. c. 461 (1959), (this was the original proceeding under protest in the Eastern Express case just cited).

> "Aside from the question of whether trailers when loaded on flat cars are instrumentalities or containers, there is no contention that the ordinary shipper may not furnish the trailers under Plan III rates, and we think likewise that they may be furnished by the forwarders."

It has been amply demonstrated by the evidence that the intent of the Legislature in adopting § 418 was to prevent the use of contract carriers by freight forwarders, and not to prevent the freight forwarders from using their own instrumentalities and containers. Commissioner Eastman drafted the bill which became the Freight Forwarder Act, and in reference to § 418, had this to say:

> "It also seems desirable that forwarding companies should be confined to the use of the instrumentalities or services of common carriers, and should not be permitted to utilize those of contract carriers. A contract carrier is a species of private carrier which does not serve the general public but confines itself to specialized service for particular shippers. A forwarding carrier, insofar as it utilizes the services of

other carriers, is technically a shipper, but its predominant status is that of a common carrier serving the general public. The shipments which it tenders to other carriers are aggregations of the individual shipments of the general public which it serves. The public function which it performs is that of an agency through which these individual shippers can act collectively and thus secure a more efficient and economic handling of their shipments than would otherwise be possible. The use of contract carriers is inconsistent with this public purpose, and may also be detrimental to the common carriers, to whom forwarding operations properly conducted can be of much advantage." *

Plaintiffs state in their Reply Brief that the intent of the Legislature cannot be grounds for varying the plain language of a statute. However, the language of the statute in question is far from being plain, when taken in connection with the situation which confronts the court in the instant case.

The construction which the plaintiffs urge is certainly not apparent from an initial reading of § 418. In this instance the court may clearly seek light from the legislative history of the statute. See II Sutherland on Statutory Construction, Chapter 45, §§ 4503-4508, Chapter 47, § 4702.

We find that the Commission in its expertise correctly held that Plans III and IV, and the rates and charges thereunder, are not violative of § 418 of the Interstate Commerce Act when used by freight forwarders.

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* Commissioner Eastman's letter, together with the draft bills, is in the bound volume of the Interstate Commerce Commission library with the title "Eastman, Joseph Bartlett. A Letter . . . Submitting a Draft of Legislation Providing for Regulation . . . of the So Called Forwarding Companies, 1940," reference number H. E. 2311U543.

Based on the record as a whole, we find that the Interstate Commerce Commission's determination of the fact issues in the instant case was based on substantial evidence. The Commission's decision is in accordance with the law. Accordingly, the plaintiffs' application for injunction is denied, and the Complaint is dismissed.

/s/ ALBERT A. RIDGE
Circuit Judge

/s/ LLOYD R. GIBSON
Chief District Judge

/s/ R. M. DUNCAN
District Judge

Dated: February 6, 1964

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. 32533[1]

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., v. BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

Decided June 19, 1961

1. Found that (1) the rail rates and charges on loaded or empty trailers and containers, moving in plan III and plan IV trailer-on-flatcar service, and the rules in connection therewith, here under investigation, and (2) the freight-forwarder volume commodity rates, are lawful, or not shown to be unlawful, as the case may be.

2. Complaint dismissed, and investigation proceedings discontinued.

Homer S. Carpenter, James E. Haydon, Thomas J. Hogan, Roland Rice, Albert W. Stout, Edgar Watkins,

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[1] This report embraces also No. 32531 and supplements, Two Flatcars—Delaware, Lackawanna & Western Railroad Company; I. and S. Docket No. 7022 and supplements, Two Flatcars in Lieu of One—Baltimore & Ohio Railroad Company; I. and S. Docket 7040, Freight, in Containers, on Flatcars—Baltimore & Ohio Railroad Company; No. 32842, Volume Commodity Rates—Clipper Carloading Company; I. and S. Docket No. 7034, All Freight—Between Chicago and Portland, Seattle, and Tacoma; No. 32543, All Freight from Chicago to Los Angeles and San Francisco; No. 32546, All Freight from Los Angeles and San Francisco to Chicago; No. 33021 and supplement, Mixed Freight in Containers on Flatcars—Baltimore & Ohio Railroad Company; and No. 33233, Freight in Containers on Flatcars—Baltimore & Ohio Railroad Company.

H. A. Welty, Le Grand A. Carlston, K. Tracey Power, and *Z. L. Pearson, Jr.*, for complainant and protestants.

Joseph C. Gill for intervener in support of protestants.

J. T. Clark; John T. Collins, Richard E. Costello, John A. Daily, Eugene S. Davis, Kemper A. Dobbins, Anthony P. Donadio, Lockwood W. Fogg, Jr., James A. Gillen, Rene J. Gunning, Eugene E. Hunt, John E. Juzaitis, William Q. Keenan, William C. Leiper, R. H. Stahlheber, Philip A. Staskus, W. J. Taylor, Malcom R. Warnock, Charles W. Burkett, Jr., Frank S. Farrell, L. S. Hamilton, L. W. Hobbs, Roland J. Lehman, Thormond A. Miller, R. K. Merrill, Edward M. Reidy, John MacDonald Smith, L. E. Torinus, Walter G. Treanor, Andrew C. Armstrong, and *Charles C. Rettburg, Jr.*, for defendants and respondents.

Harry C. Ames, Paul J. Coughlin, S. S. Eisen, James L. Givan, Giles Morrow, George H. Leonard, I. Richman, Theodore R. Schneider, and *D. Robert Thomas* for freight-forwarder defendants and interveners in support of respondents.

Nuel D. Belnap, Patrick M. Brown, John S. Burchmore, Robert N. Burchmore, David M. Daly, Robert De Kroyft, Arthur D. Vincentis, S. W. Earnshaw, Robert Elliott, Jr., Joseph E. Keller, Kenneth J. McAuliffe, John J. C. Martin, L. E. Masoner, Clement T. Mayo, Charles M. Meehan, C. A. Mitchell, Leonard F. Mongeon, Clarke Munn, Jr., Charles B. Meyers, Irby L. O'Brien, Howard D. Pollen, A. J. Roberts II, Arthur W. Todd, Barrie Vreeland, Charles A. Washer, Ralph C. Wilgus, James E. Wilson; Hugh Gordon, J. C. Kinney, and *A. E. Norrobom* for interveners in support of defendants and respondents.

REPORT OF THE COMMISSION

BY THE COMMISSION:

These proceedings are closely related, and will be disposed of in one report. Nos. 32533, 32531, and 32842, and

Investigation and Suspension Docket Nos. 7022 and 7040, sometimes for convenience referred to as the eastern cases, were heard on a consolidated record. The so-called western cases, I. and S. No. 7034 and Nos. 32543 and 32546 were heard on a separate record, but were combined with the eastern cases and made the subject of a single proposed report. Nos. 33021 and 33233 were heard on another record and were the subject of a report and recommended order.

Exceptions and replies thereto were filed by various parties. The issues were argued orally. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the title proceeding, by complaint filed on September 24, 1958, The Eastern Central Motor Carriers Association, Inc., hereinafter called Eastern Central, an association of motor carriers, alleges that the so-called plan III and plan IV trailer-on-flatcar (TOFC or piggyback) rates and charges maintained by the railroad defendants operating between certain points in New England and trunkline territories and certain points in central and southwestern territories, are unlawful in violation of sections 1, 2, 3, 4, and 15(13) of the Interstate Commerce Act, and constitute a destructive competitive practice in contravention of the national transportation policy. It is alleged also that the volume commodity rates, minimum 10,000 pounds or more, on various commodities, maintained by the freight-forwarder defendants, from and to or between certain points in New England and trunkline territories and certain points in central, western trunkline, and southwestern territories, are in violation of sections 402 and 404 of the act, and constitute a destructive competitive practice in contravention of the national transportation policy. The complainant seeks the entry of an order requiring the cancellation of the assailed rates and charges.

No. 32842 is an investigation instituted on February 17, 1959, into and concerning the lawfulness of freight-forwarder volume rates, minimum 10,000 pounds and over, on bicycles and parts, furniture, X-ray machines; photographic materials, radio and television sets, and power shovels and parts, from and to certain points in Massachusetts, New York, New Jersey, Pennsylvania, Indiana, Illinois, and Wisconsin, maintained by the respondent, Clipper Carloading Company. The schedules became effective on February 23, 1959. The proposed rates are the same as certain of the assailed rates in the title proceeding.

In I. and S. No. 7022 and supplements, by schedules filed to become effective on September 24, 1958, and later, railroads operating in official territory proposed to establish certain rules, regulations, and practices in connection with so-called plan III TOFC rates and charges between points in New England and trunkline territories and points in central territory. Upon protests of the Eastern Central and Eastern Express, Inc., the operation of the schedules was suspended until April 23, 1959, and later, when they became effective.

No. 32531 and supplements are investigations instituted on September 12, 1958, and later, into the lawfulness of certain rules, regulations, and practices in connection with plan III and plan IV TOFC rates and charges between certain points in New England and trunkline territories and specified points in central and southwestern territories.

In I. and S. No. 7040, by schedules filed to become effective on October 17, 1958, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, and the Reading Company proposed to establish plan IV rates and charges applicable on loaded and empty freight containers transported on flatcars between Jersey City, N.J., Philadelphia, Pa., Baltimore, Md., and Washington, D.C., on the one hand, and Chicago and East St.

Louis, Ill., on the other. Upon protests of Eastern Central and Eastern Express, Inc., the operation of the schedules originally was suspended until May 20, 1959, but by order of December 8, 1958, the suspension was vacated as of December 18, 1958, and the investigation continued. Reference hereinafter to TOFC or piggyback service will include containers where the particular rates are so published.

In I. and S. No. 7034, by schedules filed to become effective on October 15, 1958, and later, the respondent railroads proposed to establish plan IV TOFC rates and charges between Chicago, on the one hand, and on the other, Portland, Oreg., and Seattle and Tacoma, Wash. Upon protests of the Rocky Mountain Tariff Bureau, Inc., and the National Motor Freight Traffic Association, Inc., the operation of the schedules was suspended until May 15, 1959, when they became effective.

Nos. 32543 and 32546 are investigations instituted on October 14 and 23, 1958, respectively, into and concerning the lawfulness of plan IV TOFC rates and charges between Chicago and Los Angeles and San Francisco, Calif.

Nos. 33021 and 33233 are investigations instituted on May 7, June 17, and October 16, 1959, into and concerning the lawfulness of the plan IV rates and charges published by the Baltimore & Ohio on loaded and empty freight containers transported on flatcars between Jersey City, Philadelphia, Baltimore, and Washington, on the one hand, and, on the other, Cincinnati, Columbus, and Dayton, Ohio, Indianapolis, Ind., Louisville, Ky., and Chicago and East St. Louis. Certain of the rates to the latter two points supplanted higher rates subject to the same minimum previously published to those points and made subject to investigation in I. and S. No. 7040. The protestants are Eastern Central and the following certificated motor carriers: Cooper-Jarrett, Inc., Kramer Brothers Freight Lines, Inc., Eastern Motor Dispatch, Inc., and

Chicago Express, Inc. For convenience, these proceedings will hereinafter sometimes be referred to as the B. & O. cases.

The complainant in the title proceeding moves to strike the exceptions to the examiner's proposed report filed by the Manufacturers Shipping Association, Inc., an intervening organization of shippers engaged in manufacturing, processing, and fabricating operations in the Puget Sound area of Washington. The objections are based on the contentions that since the exceptions were due on September 30, 1960, and the order permitting intervention was dated September 26, 1960, the order did not contemplate the filing of exceptions by the intervener, and that such exceptions violate rule 1.96 of the General Rules of Practice in that they are founded wholly upon matters not of record. Particular objection is made to factual statements largely descriptive of the intervener's organization, membership, and operations. The petition prayed for leave to file exceptions. The order permitting intervention provided that the intervener be treated as a party to these proceedings, for the purpose of participating in all further proceedings herein. The exceptions were timely filed on September 30, 1960, and the motion is overruled.

DESCRIPTION OF TOFC SERVICES

In this proceeding, only two TOFC plans are in issue; plans III and IV. Three others, designated plans I, II, and V, are not in issue herein. Under plan I, the railroads transport loaded motor common carrier highway trailers on flatcars in line-haul movement between terminals, ramp-to-ramp, in substituted rail for motor service. The freight moves on motor-carrier billing, and the rail service is not held out to the public. The railroad compensation, under contractual arrangements, is based on a division of the motor-carrier charges and on the gross weight of the trailers and lading.

Under plan II the railroad provides the trailer and flatcar and performs pickup and delivery within rail terminal areas, and loading and unloading to and from the flatcar. In general, the rail rates for this service are the same as the motor common carrier rates.

Plan V contemplates joint motor-rail service at joint motor-rail rates, both modes performing line-haul movements.

Under plan III service, the shipper provides the trailers (or containers) which he owns or leases. He delivers the loaded trailers to the rail loading ramp and arranges for their movement from the unloading ramp at the delivery point. The railroad loads the trailers onto the flatcar at origin, performs the line-haul service, and unloads the trailers from the flatcars at the rail terminal. The railroad charge is stated in amounts per flatcar, a charge of the same amount applying in the opposite direction, whether the trailers are empty or loaded. Plan III thus eliminates pickup and delivery expense, acquisition, maintenance, and depreciation charges for trailers, and all empty return mileage. The railroad pays no rental charge for the trailers, and no refrigeration, ventilation, or other protective services are furnished.

The plan III rates and charges contemplate the handling of two loaded or empty trailers on one rail car, and they will not apply when more than 60 percent of the total weight of the lading consists of any one article. In I. and S. No. 7022 and No. 32531, the respondents published provisions for furnishing at their option two short flatcars in lieu of one long flatcar, and for maintaining either the 60-percent weight limitation referred to above or a requirement that the rates apply only when the lading in the trailers consist of five or more commodities, no one commodity to exceed 60 percent of the total weight. Originally, it was required that the lading consist of not less than five

different commodities, no one of which exceeded one-third of the total weight of the lading.

The service under plan IV is the same as plan III, except that the shipper provides the flatcar in addition to the container or trailer. The flatcar must be fitted with the necessary tiedown devices, approved by the railroad. Loading and securing to flatcars, and unloading and placement are at the shipper's expense.

The proposed report discussed in detail the type of equipment used in performing TOFC service, and that description will not be repeated here.

PLAN III AND PLAN IV RATES AND CHARGES

The plan III rates and charges in No. 32533 apply between railroad ramp locations in Boston, Worcester, and Springfield, Mass., Albany, Syracuse, Rochester, and New York, N.Y., Philadelphia, Pa., Baltimore, Md., and Washington, D.C., on the one hand, and, on the other, Chicago and St. Louis. All the plan III rates are constructed in essentially the same manner. Typical are those of The Pennsylvania Railroad Company between Kearny, N.J., and Chicago. On freight, all kinds,[2] loaded in trailers,[3] maximum weight of the lading 70,000 pounds, and on empty trailers, the charge is $451.50 per flatcar. A rate of 64.5 cents applies on lading in exeess of 70,000 pounds. That rate is equivalent to the charge per hundredweight at the per car charge of $451.50 for 70,000 pounds. The

[2] Except property of extraordinary value, bulk commodities, and classes A and B explosives. The lists of excepted articles differ slightly in the schedules of different railroads.

[3] Among the trailer requirements, the maximum length must not be over 35 feet. Since the hearing, the schedules have been amended to provide that the combined overall length of the trailers is not to exceed 72 feet. Also, new schedules have been established on trailers the combined length of which exceeds 72 feet.

latter charge represents 50 cents a rail-mile for the distance of 903 miles from Kearny to Chicago. The plan III charges between other points, for distances ranging from 645 to 1,175 miles, represent revenue of 50 cents a car-mile over the short rail routes.

The plan IV rates and charges in No. 32533 apply between railroad terminals in Kearny and Philadelphia and points taking the same rates, on the one hand, and, on the other, railroad terminals in New Orleans, La., and Dallas, Fort Worth, Houston, Galveston, San Antonio, and Laredo, Tex., and points taking the same rates. They apply also at intermediate points. Illustrative is the charge of $739.60 a car between Kearny and Houston, on freight, all kinds, with the exceptions previously noted, loaded in trailers and demountable trailer bodies,[4] maximum 70,000 pounds, no one commodity to exceed 50 percent of the total weight of the lading, and on empty trailers and demountable trailer bodies. The per car charge reflects 40 cents a mile for the distance of 1,849 miles over the lines of the Pennsylvania and the Missouri Pacific Railroad Company. The plan IV charges between other points were determined in the same manner. It is stated that the revenue of 40 cents a car-mile is premised upon the plan III charges adjusted to reflect the estimated additional cost to the shipper, and the longer distances of the interterritorial hauls.

The plan IV rates and charges in I. and S. No. 7040 apply on freight, all kinds,[5] no one commodity to exceed 60 percent of the total weight, in containers, and on empty containers, between railroad terminals in Jersey City, Philadelphia, Baltimore, and Washington, on the one hand,

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[4] The maximum length of the trailer or demountable trailer body not to be over 35 feet, outside measurement.

[5] Except articles of extraordinary value, live animals, and classes A and B explosives.

and, on the other, Chicago and East St. Louis, with application also at intermediate points. Although the containers must meet height and width limitations, there is no length limitation. Most of the containers used have been 17 feet in length, and four have been loaded on a 75-foot flatcar. Typical rates and charges are those between Jersey City and Chicago of $362 per flatcar, maximum 50,000 pounds, subject to the approximately equivalent rate of 73 cents per 100 pounds on weight in excess of 50,000 pounds, and $451.50 per flatcar, maximum 70,000 pounds.

The plan IV rates and charges in No. 33021 apply on freight, all kinds, no one commodity to exceed 60 percent of the total weight, in containers, and on empty containers, between Jersey City, Philadelphia, Baltimore, and Washington, on the one hand, and, on the other, Cincinnati, Columbus, Dayton, Indianapolis, and Louisville. Illustrative of the charges is that of $295.60 per car, maximum 50,000 pounds, between Jersey City and Cincinnati, subject to a rate of 59 cents on weight in excess of the maximum, and $317.20 per car, maximum 70,000 pounds.

The 70,000-pound charges in No. 33021 are on a lower level than similar charges to Chicago and East St. Louis under investigation in I. and S. No. 7040, as previously noted, and the Baltimore & Ohio subsequently published charges to those points reduced to a comparable level. At the same time, it published rates for weight in excess of 70,000 pounds between all of the named points, and those adjustments are covered by the investigation in No. 33233. In lieu of the $451.50 charge from Jersey City to Chicago in I. and S. No. 7040, the reduced charge is $403.50, and the rate on quantities in excess of 70,000 pounds is 58 cents. The 70,000-pound charge from Jersey City to Cincinnati is subject to a rate of 45.5 cents for excess weight.

The plan IV rates and charges in I. and S. No. 7034 and Nos. 32543 and 32546 apply on freight, all kinds,[6] in trailers and/or containers[7] on flatcars, and on empty trailers and/or containers, between Chicago, on the one hand, and, on the other, Seattle, Tacoma, Portland, San Francisco, and Los Angeles, and apply also at intermediate points. The published charges in each case are $924, maximum 60,000 pounds, subject to a rate of $1.54 on excess weight, the total weight of the lading not to exceed 80,000 pounds. It is provided that the rates will apply "when no one commodity or commodities in the same rate item taking the same rate on the flatcar exceeds 30,000 lbs."

Following submission of these proceedings, the National Motor Freight Traffic Association, Inc., and the Rocky Mountain Motor Tariff Bureau, Inc., filed a joint motion asking us to take official notice that the rule quoted above had been supplemented by a provision, effective January 15, 1961, that on the weight of one commodity in excess of 30,000 pounds but less than 60,000 pounds, and on total weight of more than 80,000 pounds, a rate of 663 cents per 100 pounds will apply. The motion is granted. The protestants regard the change as expanding the scope of the assailed services. In their reply, without objecting to our taking official notice, the respondents state that the purpose and effect is to assess a heavy penalty against weight in excess of that provided for a single commodity, and against weight of a shipment over 80,000 pounds. While the penalty rate is high, the new provision ap-

[6] Except articles of extraordinary value, bulk commodities, coal, coke, ice, classes A and B explosives, and live animals, game, pigeons, and poultry.

[7] The maximum length of the trailer body or container must not be over 40 feet, outside measurement, and the total length of trailers or containers, or both, must not exceed 80 feet in overall length on one flatcar. This is in addition to the maximum height and width specifications.

pears to remove limitations on the application of the charge.

Single-commodity weight limitation.—In connection with their plan III rates, most railroads publish a rule stating that the rates and charges will not apply when more than 60 percent of the total weight of the lading on each car consists of any one article. At one time, consideration was given to the adoption of a requirement that a shipment must consist of not less than five commodities, no one commodity to exceed one-third of the total weight. Such a limitation would preclude any general use by private industrial shippers, and thus only the freight-forwarder industry would be in a position to benefit. Even a 50-percent weight limitation, in effect for a comparatively short time, was found to be a major deterrent to the general use of plan III service by private shippers. This prompted the change to 60 percent. According to the railroads, that limitation provides an effective protection against the diversion of carload traffic.

In connection with the plan IV rates between eastern and southwestern points, there is a 50-percent weight limitation. No use has been made of these rates, and the railroads indicate that they might change the rule to 60 percent. As indicated, plan IV charges between Chicago and Pacific coast points apply "only when no one commodity or commodities in the same rate item taking the same rate on the flat car exceeds 30,000 lbs."

In general, industrial shippers oppose the weight limitation rules applying from and to the eastern points. They contend that the attraction of the rates is adversely affected by weight limitations; that since no such limitation applies on plan I traffic, none should apply under plan III; and that a shipper should not be forced to join a shipper association to obtain the benefit of the published charges. They urge also that such limitations are preju-

dicial of single-commodity shippers and preferential of multiple-commodity shippers, and are ambiguous.

Swift & Company understands that the term "article" in the limitation relates to any article named in the governing classification, and since the classification includes fresh meat, n. o. i. b. n., which covers all types of fresh meat, its many different types of fresh meat could be classified as one article. It shows instances of shipments which could not be transported in plan III services because the weight of the fresh meat in the shipments exceeded 60 percent of the total. Under the generic description of acids there are 41 different articles, under automobile parts 115, under chemicals 456, and under machine and machine parts 769 articles.

Provisions for a limitation on the weight of any one article, having as their objective the protection of straight carload traffic, are reasonable conditions to attach to the application of these rates and charges. With recourse to the governing classification and exceptions thereto (in the absence of a specific commodity description in the piggyback-rate tariff), no more difficulty should be encountered in determining what is covered by the name of one article than when shipping on all-freight rates in boxcars.

Two-for-one rule.—Certain of the respondents in I. and S. No. 7022 and No. 32531 desire to handle a two-trailer plan III shipment on two short flatcars, as well as on a single long flatcar, at their option. The rule is similar to classification rule 34, and has no effect upon the level of the rate or the service which the shipper receives. For shippers to obtain the maximum benefit under the plan III rates they must use two trailers to load up to 70,000 pounds. The use of two trailers necessitates the use of long flatcars.

At the time of the hearing the Baltimore & Ohio had 55 long flatcars. While this equipment is generally adequate

to meet present needs, it anticipates an increased demand which would require the use of short flatcars until additional long cars could be acquired. It has no intention of using short flatcars except when the long cars are not readily available and shipments would be unduly delayed. The Boston and Maine Railroad has an ample supply of long flatcars which it uses for plan I and plan III traffic. It uses both long and short flatcars for plan II traffic. Its connecting railroads, however, do not have a supply of long cars.

The Delaware, Lackawanna and Western Railroad Company (hereinafter called the Lackawanna, now merged into the Erie-Lackawanna Railroad Company) does not own any long cars, but it handles those of connecting lines. It prefers to use the short cars because of operating advantages and to avoid the expense of acquiring additional equipment. It operates 507 short cars which were converted from boxcars or hopper cars at a cost of less than $4,000 each, compared with a cost of about $12,300 for a long flatcar. One of the principal advantages is that trailers can be loaded on cars throughout the day, without assembling two trailers to the same destination. The long car also has the disadvantage of limited clearance.

The Lehigh Valley Railroad Company has 122 flatcars in service and 128 more on order, all of which are approximately 40 or 50 feet long. It considers that the additional time required to move two short flatcars from the track in the piggyback yard to the ramp, compared with moving one long car, is negligible. There is no difficulty in line-haul movement because the two short cars are coupled together.

The New York, Chicago and St. Louis Railroad Company (Nickel Plate) operates 125 short flatcars, and is in the process of converting old boxcars. It does not own any long flatcars, but has handled those of other lines. Its piggyback operations are limited to plans II and III.

When it established plan II service, it found that its best interests were served by hauling one trailer per car because of greater flexibility and lower car costs. It had a supply of short cars which were suited for the purpose and could be converted at a minimum cost. In plan III operations, a single trailer on a short car permits reconsignment with only a change in billing, allows part-lot loading and unloading at intermediate points, and eliminates part-empty car movement on trailers consigned to different destinations. The advantages which led it to adopt the short cars for the plan II service commend them for plan III service also, although it has under study the matter of procuring long cars.

Long flatcars of the depressed type and 353 short flatcars are used by The New York, New Haven and Hartford Railroad Company in its plans I, II, and III operations. This road is of the view that it would be a mistake to invest further in long cars and leave short cars idle until equipment is available which can be interchanged with all connections. There is a present lack of uniformity in multitrailer flatcar equipment and ramp facilities.

The two-for-one rule in principle reflects the operating considerations recognized in our tariff circular rule 66(a), and, as noted, the provisions of classification rule 34. We see no objection to the use of such a rule in connection with these TOFC rates.

Other services.—Several railroads, including the Pennsylvania, Baltimore & Ohio, The Atchison, Topeka and Santa Fe Railroad Company, and Chicago, Burlington & Quincy Railroad Company, have performed for freight forwarders the loading and unloading of lading into and out of trailers moved in plan III or plan IV service. Several eastern railroads, including the New York Central, Pennsylvania, Lackawanna, Nickel Plate, Lehigh Valley, and Baltimore & Ohio, have leased, either directly or indirectly through subsidiaries, trailers or flexi-vans on a

trip-lease basis to shippers, including freight forwarders and shipper associations. In addition, some railroads, including the New York Central and Pennsylvania, either directly or indirectly through subsidiaries, perform the cartage of the trailers between the shippers' places of business and the railroads' ramp locations. The railroads have found that the utilization of their trailers in plan III service through trip-lease arrangements has had the effect of reducing their empty trailer-miles, as it enables the "interweaving" of plan II and plan III trailer utilization. The reduction results principally because the railroads, including their subsidiaries, generally lease only their surplus trailers, and, as in the case of the Pennsylvania, only to shippers desiring to make use of the trailers to destinations at which the Pennsylvania wants them.

In addition to the trip lease of trailers by the railroads, including their subsidiaries, to shippers for use in plan III, the Lackawanna has trip leased the trailers of a shipper, Swift and Company. The traffic of the latter moves eastbound only, and to avoid itself of plan III service it has leased trailers both on a trip-lease basis and on a round trip basis. When the leases are on a round trip basis it has subleased the trailers to the Lackawanna also for the return westbound movement.

Rate relationships.—Reduced to a hundredweight basis, the plan III charges in No. 32533 reflect from 11.6 to 16.4 percent of first class; the plan IV charges in No. 32533 reflect from 14.9 to 15.8 percent of first class. The plan IV charges in I. and S. No. 7040, subject to the 50,000-pound maximum are from 15.3 to 17 percent, and those subject to the the 70,000-pound maximum from 13.6 to 15 percent, of first class. The plan IV charge in I. and S. No. 7034 and Nos. 32543 and 32546 is 16.26 percent of first class. Of more than 12,000 carload ratings in the rail uniform classification, only 10 ratings are lower than

17.5 percent of first class; 1 at 16 percent applies on sand, mixed with clay, crushed stone, and gravel or pebbles, in bulk, minimum 80,000 pounds, and 9 at 13 percent apply on such commodities, n. o. i. b. n., as sand, granulated or lump slag, and gravel, minimum 80,000 pounds.

On freight, all kinds, with certain exceptions, the railroads maintain commodity rates, minimum 30,000 pounds, which reflect approximately 45 percent of the first-class rates between points in official territory. For example, between Kearny and Chicago, the Pennsylvania's rate on such traffic is $2.02 per 100 pounds, which is 44.6 percent of the class 100 rate between those points. Those rates are subject to the so-called streamlined rule 10, which has the effect of making the all-freight rates the maximum rates. *Eastern Central M. Carriers Assn.* v. *Akron, C & Y. R. Co.*, 293 I.C.C. 295, 306 I.C.C. 61. The railroads maintain commodity rates on specific articles which are rated lower, as well as higher, than class 45. When articles rated lower than class 45 are mixed with other commodities, the rule has the effect of reducing the percentage of first class. Its application has made the average rate on mixed carloads less than 40 percent of first class.

From and to points in official territory, the carload commodity rates maintained by the railroads are generally on the basis higher than 17.5 percent of first class, except on certain low-grade commodities. For example, of the 102 carload commodity items from the New York City area to Chicago in tariff I.C.C. No. A-1116 of the Trunk Line Territory Tariff Bureau, 16 items name rates on a basis less than 17.5 percent of first class. The rates in such items are on commodities such as bauxite ore, slag, refractory products, chalk whiting, and grain products. The carload commodity rates on the remaining items range as high as 87 percent of first class. Among them are rates equivalent to 79.5 percent of first class on clothing, minimum 25,000 pounds; 56.3 percent on woolen

goods, minimum 40,000 pounds; 34.7 percent on crude hog hair, minimum 30,000 pounds; and 52 percent on cigarettes, minimum 36,000 pounds, with an incentive rate 41.5 percent of first class.

Most of the eastern railroads operate plan II service. The operations of this service by the Pennsylvania and the New York Central are quite extensive. The latter maintains many carload commodity rates and minima which are the same as the motor common carrier truckload rates and minima. No plan II carload commodity rate maintained by the New York Central between any two points in official territory is on a basis of 17.5 percent or lower. Between New York City and Chicago, the plan II carload commodity rates range from about 25 to 60 percent of first class.

On freight, all kinds, the western railroads maintain a carload commodity rate, minimum 36,000 pounds, between Chicago and the Pacific coast points, which is 48.57 percent of the class 100 rate. The boxcar and plan II carload commodity rates between Chicago and Pacific coast points are generally higher than the plan III rates. For example, the boxcar rates range from about 25 to 84 percent of first class, on such articles as leather, nitrate of barium, automobile parts, bird food or seed, candy, petrolatum preparations, and magnesium metal; and the plan II rates range from about 35 to 85 percent of first class, on such articles as bird food or seed, boots and shoes, drugs and medicines, candy or confectionery, wrapping paper, and iron or steel castings or forgings.

The western railroads publish relatively few carload commodity rates between Chicago and the Pacific coast which are less than $2. On the first 150 pages of one of their commodity-rate tariffs there are 310 rate items, of which 260 provide carload rates of $2 or more, 31 ranging from $1.54 to $1.99, and 19 lower than $1.54. Such rates do not include the Ex Parte No. 212 increases, which range

from 1 cent per 100 pounds to 5 percent. A comparison of representative carload commodity rates on some 258 items ranging from airplane parts, n.o.s., minimum 10,000 pounds, to plaster retarder, minimum 80,000 pounds, between Chicago and Pacific coast points, shows that the plan IV charge reduced to a hundredweight basis would be substantially lower than the majority of those rates.

The practice of establishing commodity rates on carload traffic has been accelerated during the postwar period because of competition and industry requirements. Not more than about 4 percent of the rail carload revenue is derived from class rates, and about 1 percent of the rail carload tonnage moves under rates subject to classification ratings in official territory. The preponderance of the rail traffic moves at commodity rates, although a very substantial portion moves under rates subject to classification exceptions ratings.

The eastern railroads consider the plan III rates as commodity rates in the same category as other special rates. It is their position that value of service, on which in major degree the carload ratings in the classification are based, has little significance in competitive transportation as it exists today. They urge that external competition, especially private carriage, has virtually eliminated value of service as a controlling factor. The western railroads contend that the rigidity of railroad operations has resulted in their loss of the class of traffic which historically has been able to bear the burden of such a factor, and that drastic departures in the traditional methods of rate-making are necessary.

The eastern railroads urge that the plan III charges were designed to be competitive with the cost of operating motor vehicles; that for this reason they disregard the traditional concept of pricing the various articles in accordance with what the traffic will bear, and accord no important recognition to the element of loss and damage,

which has been almost negligible in piggyback service. They state that the various articles of commerce are automatically classified by their density and loading characteristics, so that articles which can be loaded to only 15,000 pounds in a trailer or 30,000 pounds in a car are charged a rate per hundredweight twice as high as those which can be loaded to 30,000 pounds in a trailer or 60,000 pounds in a car.

The western railroads contend that a direct comparison cannot be made between shipments at carload rates and shipments at the plan IV rates because the total cost to the shipper in plan IV service is not the charge made only for the transportation by the railroad. The shipper is required to provide the flatcar and trailers and to absorb the cost of any empty return or a light-loaded movement. They argue that all-freight rates which reflect less than class 45 do not jeopardize the carload rate structure in transcontinental territory because only 1 percent of transcontinental traffic moves under all-commodity rates and the use of commodity rates is a characteristic of the transcontinental rate structure. There are numerous commodity rates on straight and mixed carloads which are below class 45, and whenever the commodity moves in appreciable volume the transcontinental railroads publish specific commodity rates to cover it. They consider the all-commodity rate as a "catchall" rate to take care of infrequent movements.

An intervener, Central States Motor Freight Bureau, Inc., fearing the intention of the railroads, and the expectation of the supporting shippers, to extend the plan III rates from, to, or between points in central territory, shows by comparisons that the differences between the usual rail rates and plan III rates on the basis of 50 cents a car-mile, between points in central territory, would result in substantial savings to the shipper. For example, the New York Central maintains a rate of 73 cents, mini-

mum 70,000 pounds, on rubber compounds from Indianapolis, Ind., to Detroit, Mich., which on minimum shipments would produce charges of $511, $361 more than a plan III charge of $150. The bureau contends that the difference of $361 would be substantially more than the expense which the shipper would incur for furnishing the trailers and the cartage. It does not believe that the 60-percent weight limitation would have the effect of deterring most shippers from the use of the 70,000-pound minimum. It refers to *R. E. Cobb Co.* v. *Missouri-K.-T. R. Co.*, 163 I.C.C. 241, in which it was held that the same article or commodity in a different packing was a different article or commodity and met the requirements of a mixture.

The bureau points out that the Illinois Central Railroad Company and the Chicago & Eastern Illinois Railroad Company proposed to establish plan III rates between Chicago and St. Louis of $150, which would reflect 21.4 cents per 100 pounds and 8.8 percent of first class. Upon suspension of this charge, these roads established an Illinois intrastate rate between Chicago and East St. Louis on the same basis. The suspended interstate rate has been canceled. The Chicago & Eastern Illinois publishes plan II rates in connection with which it maintains tariff allowances to shippers when they furnish the trailer and provide their own pickup service. The allowance for pickup is 5 cents per 100 pounds, and the allowance for the time the trailer is in the possession of a carrier is $5 a day or fraction thereof. The plan II charge at carload commodity rates, minus the allowances to the shipper for furnishing the trailer and providing pickup and delivery service, would exceed by substantial amounts the cost to the shipper for the same service under plan III. For example, this carrier maintains a plan II commodity rate of 68 cents on adhesive paste from Chicago to St. Louis, which would yield $476 on a 70,000-pound shipment loaded in two trailers. Considering $20 for trailer allowance, and

$70 for pickup and delivery allowance, the net charges would be $386, as compared with the plan III charge of $150.

FACTORS AFFECTING PLANS III AND IV SERVICE

The railroads state that private carriage has made serious inroads in regular movements of finished products and return loads of raw materials. During the 5-year period 1950-55, private carriage increased more than 19 billion ton-miles, or about 37 percent, as compared with an increase of 14 billion, or 20 percent, in the total ton-miles of for-hire motor carriage. The percentage of the total highway traffic moving by private carriage, however, has tended to stabilize during the last 15 years. In 1936, 1944, 1949, 1950, and 1955, the percentages of ton-miles by private carrier were 57.5, 44.4, 48.5, 43.4, and 46.6, respectively. It is conceded that some of the motor-carrier traffic is noncompetitive with rail service, such as milk and other farm products moving to nearby markets, trucks engaged in local distribution, and others of lesser significance. Such noncompetitive highway traffic has never been accurately measured. It is evident, however, that a substantial portion of private carriage is competitive with both rail and motor for-hire transportation.

The different piggyback services are prospective solutions to the problem of arresting the diversion of long-haul traffic from railroad to highway service. Plan I service appeared to offer the best means of quickly building up a large volume of piggyback traffic. Since its inception, plan I has produced an erratic volume which has created a problem of having available the service and equipment when it is sought. In 1955, 1956, 1957, and 1958 the Pennsylvania handled an average of 396.3, 697.2, 1052.8, and 622.4 trailers a week. The use of plan I by the motor carriers has been largely for their overflow business.

Plan II is generally not profitable on shorter hauls, and terminal expenses must be closely controlled and loaded movements reasonably balanced so as to avoid excessive movement of empty vehicles. It is not fully competitive with motor carriers because it lacks the same degree of flexibility. Its traffic potential appears to be limited largely to industries located within a short trucking distance of rail terminal ramps. The average number of trailers handled by the Pennsylvania in plan II increased from 56.4 a week in 1954 to over 500 a week in the early part of 1959.

Plan III and IV services simplify terminal operations, increase utilization of flatcars, enable the railroads to offer better train schedules, lower their capital requirements, and relieve them of the complex terminal problems in the handling of forwarder traffic. This is especially true at New York City, where a great volume of forwarder traffic is handled. Freight stations in New York City are located in congested areas. Arrival of outbound forwarder freight at such stations reaches its peak between 2 and 5 p.m., and results in platform congestion and loading errors which, in turn, result in claims for losses, as well as additional transportation. The opportunity for pilferage is great. Except on the New York Central, car floats must be used between the freight stations and the trainyards in New Jersey.

To illustrate the saving in handling forwarder traffic in plan III rather than boxcar service, it is shown that a forwarder shipment weighing 46.2 tons originating on the Pennsylvania at New York and destined to Chicago for unloading by another railroad was loaded into seven cars, on which the revenue to the Pennsylvania amounted to $1,523.79. The terminal expense at New York totaled $510.18, leaving revenue of $144.80 per car to cover all other cost. A plan III shipment between the same points, weighing 33 tons, was loaded on one car and produced revenue of $451.50. Terminal expense at both New York and

Chicago on this shipment was $37.56, leaving a balance of $413.94 to cover the line-haul expense.

Based on operations of the Pennsylvania, a shipper's cost of providing two trailers, loading the trailers and moving them to the railroad ramp, and then from the railroad ramp to the consignee's dock and unloading, plus the line-haul plan III charge from New York to Chicago of $451.50, would result in a total cost to the shipper of $657.50. Reduced to a hundredweight basis, this would range from 93.9 cents for a 70,000-pound load to $1.644 for a 40,000-pound load. The average total cost is equivalent to 36.4 and 40.1 cents a mile for the rail and highway distances of 903 and 820 miles, respectively.

From an operational standpoint plan III service is similar to plan I. In both cases there is a substitution of rail line-haul movement for a portion of the total through movement. The eastern railroads contend that, as under plan I the problem is to determine the measure of highway costs which will be eliminated by for-hire motor carriers when substituted rail service is used, so under plan III the problem is to determine the measure of the highway costs which will be eliminated by private motor carriers when substituted rail service is used. Based upon their experience in plan I service and a study to determine the motor common carrier costs avoided by using substituted rail line-haul service between New York and Chicago, the railroads concluded that any charge for the substitution of rail service in excess of 25 cents a rail-mile would preclude the use of rail service.

The New Haven established the plan III rates and charges to meet the competition of other railroads. It serves a highly developed manufacturing territory. Its inbound movement of raw materials outweighs its outbound movement of manufactured articles by about 4 to 1, resulting in a surplus of cars westbound. From the point of view of the New Haven, the boxcar operation is more

economical than piggyback, but that is no indication that plan III is uneconomical. It found that general increases in rates have had a greater effect on merchandise and miscellaneous traffic than on any other type. Approximately 70 percent of its total revenue is derived from manufactured and miscellaneous traffic, which is much higher than the average for eastern-district carriers and considerably higher than for the railroads as a whole. Its principal loss has been to the motor common carriers. Freight-forwarder traffic moving on the lines of the New Haven moves at all-commodity rates and rule 10, so that when all-commodity rates are reduced or new ones are established the ability of the forwarder to compete with the railroad for the less-than-carload traffic is increased. The volume of less-than-carload traffic on the New Haven has declined greatly and is not believed to be profitable.

Initially, the Baltimore & Ohio established the plan III rates to meet the competition of the Pennsylvania and New York Central. It believes that plan III service will aid in coordinating truck operations and attract a large volume of merchandise freight back to the railroads. In addition to increasing carload traffic volume, plan III has developed a new source of revenue from the movement of a substantial volume of less-than-carload traffic by freight forwarders, carload consolidators, and shipper associations, which presently provide the plan III traffic on this road. The growth of the number of shipper associations indicates that the traffic volume will increase with the railroads' ability to provide better piggyback service.

The Baltimore & Ohio proposed the plan IV rates between points in official territory at the request of the ABC Forwarding Company. It knows of no other shipper now interested in the service, but anticipates that the rates will develop shipper-association traffic in addition to freight-forwarder traffic. These rates would reflect economies not possible in boxcar service, flowing from a reduction in car

switching and in loss and damage claims, and elimination of car expense as well as of New York Harbor floating operations. Billing is less complicated and expensive. Also, because of the application of so-called promiscuous loading and marriage rules in connection with the boxcar all-commodity rates, the plan IV per car revenues would be higher.

The purpose of the western railroads is to meet motor-carrier competition between Chicago and the Pacific coast on shipments which now move by motor carrier at truckload rates and at volume rates, minima 10,000, 15,000, 20,000 and 25,000 pounds. They have not established any substantial number of rates subject to minima between the less-than-carload lots and carloads, believing that they can better meet the competition by piggyback service. It is their position that to compete costwise the traffic must be handled in carload lots, and to be competitive servicewise the shipper must be accorded door-to-door service. The plan IV service itself does not meet motor-carrier competition. Something more has to be done, and the railroads expect that the freight forwarder or the shipper association will do it; that is, pick up and consolidate the larger less-than-carload shipments at origin, tender the shipment for line-haul movement in plan IV, and at destination break bulk and distribute to the ultimate consignees. In other words, these railroads seek to attract the traffic of the private shipper through the medium of the forwarder or consolidator.

It is less costly to handle plan IV traffic than other traffic because the 100-percent loaded movement eliminates car distribution costs; there are no switching, labor, or material costs for conditioning cars; a substantial percentage of the cars will load and reload without the necessity of any terminal switching; and the loading ramps are located at strategic points in relation to the trainyard so as to minimize the amount of switching from and to trains. Additionally, the western railroads derive the benefit of heavier

loads, the relase of boxcars for other purposes, and a reduction both in loss and damage claims and in the need of capital investment to add to their present car supply.

RAILROAD TRAFFIC TREND

Ton-miles of intercity freight traffic, public and private, by all modes of transportation, in 1957 were 249 percent of those in 1939. The corresponding percentage changes in railroad, motor, water, pipeline, and airway participation in that period were 185, 494, 241, 419, and 5,009 percent, respectively. In 1929, the railroads handled 74.9 percent of the total ton-miles of intercity freight. During the 1930's the percentage declined until it reached 61.3 percent in 1940. Wartime demand and dislocations in competing modes caused a large increase in 1941-43. Since 1943, the rails' share of the total traffic has steadily declined. In 1957, it fell to a new low of 46.3 percent. On the other hand, the portion of freight traffic handled by motor-trucks, including private and exempt carriers, grew from 3.3 percent in 1929 to 19.3 percent in 1957. Between 1945 and 1957, while industrial production in the United States increased 34 percent and railroad ton-miles decreased 9 percent, the number of intercity motor carriers reporting to this Commission increased 209 percent, and private and exempt carriers increased 345 percent. Traffic handled by exempt and private carriers increased from less than 40 billion ton-miles in 1945 to more than 176 billion ton-miles in 1957. Thus, the private and exempt carriers handled a volume of traffic equivalent to 28.4 percent of that handled by the railroads in 1957, compared with only 5.8 percent of the rail volume in 1945.

In 1957, the railroads operating in transcontinental territory originated 100.37 percent of the carload tonnage and 39.08 percent of the less-than-carload tonnage that they had originated in 1948. Freight-forwarder tonnage originated in 1958 was 101.8 percent of their originated tonnage

in 1948. It is the western railroads' position that since their carload business did not increase, a drastic reduction occurred in their less-than-carload business, and the freight-forwarder tonnage remained about the same, it follows that the motor carriers must have captured a large volume of the less-than-carload traffic formerly moving in rail service, as well as the bulk of the additional intercity traffic generated by the growth of the national economy.

In 1953, the eastern railroads made a study of straight carload traffic from the New York area to the Chicago area, and a similar study was made for the week of November 16-22, 1958. Comparison of those studies shows that in that period the number of carloads, the total tonnage, and the total freight revenue declined more than 50 percent, and the average revenue per ton increased only slightly despite intervening general rate increases. This apparently was the result of the erosion mostly of high-rated traffic, together with numerous reductions made in carload rates to meet competition.

POSITION OF INDIVIDUAL MOTOR CARRIERS

Several motor common carriers, namely, Eastern Express, Inc., Kramer Bros. Freight Lines, Cooper-Jarrett, Inc., Norwalk Truck Lines, Inc., Gateway Transportation Company, Be Mac Transport Company, Inc., and Eastern Motor Dispatch, Inc., which operate in official territory, oppose the plans III and IV rates and charges. Some have lost traffic to plan III service, and the others anticipate a loss upon the railroads' contemplated extension of the service to additional points. In general, they meet intense competition from the railroads as well as from the freight forwarders, shipper associations, and consolidators at principal points in the territory. They are able to maintain necessary facilities and services between small intermediate communities, many of which are not served by any other mode of transportation, because of the traffic they move between large metropolitan centers. Services at the inter-

mediate communities, in many instances, are performed in so-called peddle-run operations which are somewhat more costly.

It is urged that substantial loss of traffic between the major centers would place a heavier burden on motor operations between the small intermediate points, and rates would have to be increased; also that service might have to be discontinued or curtailed between some points.

Since the plan III rates encourage greater consolidation of less-than-carload shipments into carloads because they widen the spread between less-than-carload and carload rates, it is feared that less-than-truckload traffic between major cities would virtually disappear, and only light and bulky commodities would be expected to move by motor common carriers.

The motor carriers contend further than the plan III form of rate-making would encourage rather than discourage private carriage, because once shippers obtain equipment, drivers, and other facilities for motor transportation, those that have traffic moving in both directions are likely to stay on the highways.

Watson Bros. Transportation Company, Inc., Interstate Motor Lines, Inc., Illinois-California Express, Inc., Navajo Freight Lines, Inc., Consolidated Freightways, and Denver-Chicago Trucking Company are motor common carriers operating between Chicago and the Pacific coast. Interviews with shippers occasioned by the loss of traffic from south Pacific coast points disclosed that the traffic had been diverted to shipper associations, consolidators, and others, including so-called car-leasing companies. In some instances, the same individual was operating more than one shipper association or consolidator. Among the consolidators and/or car-leasing companies are two located at the Los Angeles address of Clipper Carloading, a freight forwarder with authority to handle transcontinental traffic westbound only.

The shipper associations and other consolidators advertise reduced rates in piggyback service. For example, one solicits traffic at rates the same as the freight-forwarder or common-carrier truck rates on shipments up to 500 pounds, and on shipments over 500 pounds at the freight-forwarder or common-carrier rates minus 10 percent. Another quotes rates which range from $4.31 on shipments weighing up to 500 pounds to $3.30 on shipments weighing 10,001 to 12,000 pounds. The weight brackets follow no pattern; in some instances, the difference is 100 pounds, and in others it is as much as 1,000 pounds. Similarly, the the rates follow no pattern, but are gradually lower with the increase in the weight of the shipment. The same consolidator quotes special volume rates ranging as low as $2.50 on 30,000 pounds. Where a shipper tenders several shipments in any 1 day lower rates apply.

The carriers' investigation further revealed that the effect of the plan IV rates extends beyond Chicago, a number of organizations quoting charges and arranging for the transportation beyond that point. For example, a car-leasing company has solicited a motor common carrier to enter into an arrangement whereby that carrier would transport alcoholic liquors from Louisville, Ky., to Chicago in highway trailers leased from the car-leasing company, and the liquor would proceed to Los Angeles in piggyback operation under the plan IV rate. On alcoholic liquor from Louisville to Los Angeles the rail rate for conventional service is $3.25, minimum 30,000 pounds, and $2.60 on the excess over 30,000 pounds in the same car. The corresponding motor common carrier rate is $3.73 on the first 30,000 pounds and $2.99 on the excess up to 40,000 pounds. The motor-carrier rate from Louisville to Chicago is 58 cents, minimum 30,000 pounds, which is equivalent to a combination of $2.12 in connection with the plan IV charge from Chicago to Los Angeles.

Interstate Express Car, a car-leasing company, is owned by the president of Ringsby Truck lines, Inc. The latter

acquired two freight-forwarding companies to protect itself from the threat of diversion of its transcontinental traffic to freight forwarders, shipper associations, and other consolidators. The subsidiary forwarders, in the use of plan IV service, found themselves confronted with an imbalance of traffic. This led to the formation of Interstate Express Car. The latter agreed to lease trailer and flatcar space for a charge of $700 a trailer between Los Angeles and Chicago. Following a quotation of $650 by another car-leasing company or consolidator, Interstate Express Car quoted $600 and was enjoying the traffic at the time of the hearing. It also held itself out to lease flatcar space and trailers at a negotiated price. It discovered that Clipper Carloading was leasing its entire equipment for movements from southern California to Chicago through a car-leasing company which was active in negotiating sales for both less-than-truckload and truckload traffic of the shipper. When a full trailer could not be leased by one shipper, it would arrange leasing to several shippers, and would divide the expense plus a small amount of profit to cover its service among those shippers.

Several shippers have declined to contract with Interstate Express Car pending our determination in these proceedings. They are impressed with the level of the transportation costs under the leasing arrangements, and believe that new marketing areas can be opened, if they may lawfully ship through the car-leasing companies. Their reluctance caused Interstate Express Car to authorize its salesmen to offer canned-goods shippers arrangements for as little as $400 a trailer. In most instances, the rail carload rate is about $1.57, minimum 70,000 pounds.

Of the seven motor common carriers operating in transcontinental service which presented evidence in this proceeding, only Ringsby sustained a decline in revenue-miles operated and tons transported during the first quarter of 1959, as compared with the first quarter of 1958 and 1957.

As a whole, the average of the seven carriers shows an 18-percent increase in revenues, an 8-percent increase in the number of miles operated, and a 23-percent increase in the tons transported for the first quarter of 1959 over the first quarter of 1957. Those results, however, reflect system operations.

FREIGHT FORWARDER AND SHIPPER EVIDENCE

With respect to the rates and charges in the eastern cases, the freight forwarders have found that plans III and IV enable them to serve the public better and to effect economies in their operations. In boxcar service they use motor carriers to bring shipments to their assembly stations, where the shipments are handled across the platform, loaded into the boxcar as a single consignment, and forwarded to the break-bulk stations. At the break-bulk stations the consolidated consignments are unloaded into trucks for delivery to the consignees. Frequently, shipments are transferred at intermediate points, which entails additional handling and some delay.

In plans III and IV, many of the forwarders' terminal operations can be eliminated or minimized. When it is known that a shipment is large, it is possible to have it picked up and delivered by the line-haul trailer. The piggyback service eliminates car floatage at New York, thereby enabling the forwarders to make later pickups and still make scheduled train departures.

The use of plan III and plan IV services has reduced loss and damage claims. During October and November 1958, the total in claims for loss and damage, per 100 pounds, amounted to 14.7 cents on all traffic and 2.6 cents on plans III and IV traffic handled by Universal Carloading and Distributing Company, Inc.

The average load handled in a trailer by the freight forwarders between New York and Chicago under plan III

in the period September 15 through October 15, 1958, was 25,041 pounds, and the average costs were $16.61 a trailer for transfer at origin and destination, and $19.25 for one-way rental. During October and November 1958, Universal Carloading forwarded 9,405,446 pounds of freight from New York to Chicago in boxcars. This freight was loaded by the railroads at New York and also unloaded by them in Chicago at a rate of $4.09 a ton. The freight was rated under the so-called streamlined rule 10, under which each article takes a straight carload rate subject to the all-commodity rate of $2.02 as maxima. Universal's average line-haul cost on this traffic was $2.30 per 100 pounds, including 41 cents for loading and unloading. If this traffic had moved under plan III at the average load of 25,000 pounds, the total cost would have approximated $1.60 per 100 pounds, which includes 90 cents for rail line-haul movement, 54.5 cents for loading and unloading, 8 cents for trailer rental, and 7 cents for trailer transfer at origin and destination. These comparisons do not take into account the cost for pickup and delivery because they would be the same in both services. The plan III movement would represent a 30-percent reduction in the average cost of movement in boxcars.

The National Conference of Non-Profit Shipping Associations, Inc., is a voluntary organization of certain associations engaged in the consolidation of freight as agents for their members. It has no particular interest in any specific piggyback plan, but supports them generally so long as they are available for use by individual shippers and groups of shippers now consolidating their freight under the exemption provided in section 402 (c) of the act. It desires that volume limitations, equipment rules, and every other condition surrounding the rates be uniform, even to the extent of requiring the railroads to provide reasonable rentals or per diem charges for equipment that might be rented or leased to the general public.

The Military Traffic Management Agency, Department of Defense, believes that the service under plans III and IV will contribute to an increase in the national defense capability of the transportation system. The traffic shipped by the Department of Defense is on Government bills of lading, and under section 22 of the act it is possible for the Government to obtain transportation free or at reduced rates.

The Private Carrier Conference, Inc., of the American Trucking Associations, Inc., requests us to find that there is a definite and urgent need for the types of piggyback service offered under plans III and IV; that to deny the railroads the right to provide the service would deprive the shippers of their freedom of choice in selecting a mode of transportation; and that under the plans shippers are not required to provide "instrumentalities of transportation."

The American Retail Federation contends that plans III and IV rates should not be compared with rates based upon classification criteria because they represent only a portion of the shippers' costs of the through movement or service which is accorded shipments moving at class rates; that the services and charges under these rates are competitive with highway transportation of all commodities, and thus most of the recaptured traffic would be derived from exempt and private cariers; and that the services must be based upon charges which do not exceed the equivalent highway costs for which they are a substitute.

The National Industrial Traffic League takes the position that the plans III and IV rates are lawful, constitute a progressive step in ratemaking, and hold promise in the future of coordinated service with attendant economies and service benefits to the public. It argues that the usefulness of the rates in issue is seriously affected by the single-commodity weight limitation, and that the railroads should

provide the service at intermediate and off-route points. Two of its members, the Radio Corporation of America and Kraft Foods, submitted evidence in support of those views.

Kraft Foods privately operates heavy trucks, but it also uses all other transportation modes. Over a period of years the rail percentage of its total transportation has been steadily declining. It uses plan II quite extensively in various parts of the country, but has made little use of plan III because of overall costs, lack of arrangements for the protection of perishables, and the single-commodity weight limitation. It must use a plan under which it retains control of the trailer at destination, so that it can make deliveries beyond the terminal area.

The Radio Corporation of America distributes widely from its factories located throughout the country. During the past few years it has instituted private carriage to move materials from the New York-Philadelphia areas to its television and record plants at Indianapolis, and to move the finished products in the reverse direction. Regular rail service does not provide comparable costs, flexibility, or speed of delivery. Plan II service provides flexibility and speed, but fails in the area of cost. Motor-carrier service also is more costly and does not have as much flexibility as private carriage provides. Plan III would meet the speed, flexibility, and cost requirements, provided it is supplied at an average cost of 25 cents a mile, which is on a par with this shipper's cost experience.

The Eastern Industrial Traffic League contends that if it appears that the railroads can make a reasonable profit on the traffic which they seek to obtain at the rates here in issue, they are not engaging in a destructive competitive practice; that any argument that the motor carriers have a right to be protected from competition is not in harmony with the purposes of the amendment to the rule of rate-

making made by the Transportation Act of 1958; that plan III more nearly approximates private carriage than common carriage; and that the assailed rates would strengthen common carriage by diverting tonnage from private carriage.

The New Jersey Industrial League supports the publication of rates which enable shippers to enjoy service comparable with the plan I service extended by the railroads to motor common carriers. It contends that the rate level does not represent a departure from fundamental concepts of ratemaking; that without a diversion of traffic from the motor competitors the rail rates would not be competitively effective; and that general increases in both rail and motor rates in recent years have made common-carrier traffic vulnerable to diversion by private transportation. Two members of this association, Tung Sol Electric, Inc., and Gering Products, presented evidence.

Tung Sol Electric manufactures cathode ray tubes, electronic receiving tubes, incandescent lamps, and electric switches. It operates plants in New Jersey and has a warehouse in the Chicago area. It is a member of a New Jersey shippers association which uses plan III, and a substantial part of its less-than-truckload traffic to Chicago is handled by this pooling association. It is trying to make arrangements with the association for the handling of its trailer-load shipments. Gering Products of Kenilworth, N.J., manufactures thermoplastic powders, granules, pellets, and plastic film and sheeting in various sizes and shapes. It use of plan III through the same association has made it economical to pay warehousing costs in Chicago, and thus enabled it to compete with a Chicago manufacturer. It ships on an average of three truckloads a week to Chicago. It has not shipped directly because of the 60-percent weight limitation, and it does not have plant facilities to ship 70,000 pounds in 1 day. Services of motor carriers are still employed on shipments direct to customers, but after more

experience with the lower cost transportation under plan III it does not expect to continue such use.

Members of the Manufacturing Chemists' Association, Inc., ship more than 90 percent of all chemical traffic moving in interstate commerce. It takes the position that the plan III rates are lawful, but that the 60-percent weight limitation should be relaxed or removed to make the service available to more shippers. Five members of this association presented evidence in support of plan III. In general, the proportion of their traffic moving by rail in boxcar service has gradually declined and that by motor carrier has increased. In the last several years their use of plan III service has convinced them of its desirability from the standpoint of flexibility, convenience, and cost. Several of these shippers have made studies of the cost of private transportation, generally between the New York-Philadelphia areas and the Chicago-St. Louis areas, which indicate a cost of operating owned or leased vehicles of about 35 cents a truck-mile. The plan III service has deferred a decision on the matter of private transportation. While the plan III rates and services are thus more attractive, these shippers do not believe that they will replace highway transportation, but will blend the best elements of both forms to the public benefit.

The members of the Drug & Toilet Preparation Traffic Conference account for more than 80 percent of the dollar volume of all articles moving in interstate commerce at rates on drugs, medicines, and toilet preparations. The conference is particularly interested in plan III because the traffic moving in that service is the kind most adaptable to private carriage. Practically all carload and truckload movements of its members are plant-to-plant or plant-to-warehouse. Distribution to customers from plants and warehouses is almost entirely by motor common carriers in less-than-truckload lots, and is not susceptible to either private carriage or plan III arrangements. It represents the larg-

est segment of the industry's tonnage and will continue to move by motor common carrier.

The conference contends that its members will avail themselves of private carriage on the plant-to-plant and the plant-to-warehouse movements and seek to couple their inbound volume shipments with their outbound shipments to the greatest degree possible if the plan III rates are required to be canceled. Conversely, continuance of the plan III rates will return to common carriage much of the tonnage now moving in private carriage, and prevent further diversion of tonnage from common to private carriage. It is urged by the conference that at the rate levels currently provided, plan III not only offers shippers a service superior to private carriage, but one superior to boxcar, plan II, or motor common carrier service. Compared to boxcar service, plan III eliminates the expense of bracing, reduces transit time, and practically eliminates damage. Compared to plan II and motor common carriage, it places the pickup and delivery arrangements under the control of the shipper, thereby enabling better scheduling of the loading operations.

Five members of the conference testified in support of its views. Several are now using private carriage for some of their traffic, at costs which can be met only by plan III rates and service, and then only on a part of the traffic. The others have made studies of the cost of private transportation, and the availability of plan III rates and service has deterred them from resorting to private carriage.

The members of the Eastern Brewers' Traffic Association use all forms of transportation. Private-carrier operations have been extended during the last 20 years beyond the normal local delivery areas. Common-carrier costs, both rail and motor, have increased beyond the brewers' ability to use such services. It is believed that the plan III service will correct this situation, but it is not certain that

the rates in issue are low enough to curtail private operations. It is believed that the 25 cents a mile cost is too high, by 7 or 8 cents. The plan is advocated as a more modern method of pricing rail transportation. It is believed, however, that there should be no single-commodity weight limitation, and that protective services should be made available.

For many years the Brown Shoe Company made daily carload shipments of shoe materials and shoes from Boston to St. Louis. On arrival at St. Louis the cars were unloaded by motor carriers for distribution to its St. Louis warehouses. The cost for this unloading and distribution was about 38 cents per 100 pounds. On August 8, 1958, it began using plan III, and from that date through February 11, 1959, 107 cars moved from Boston to East St. Louis. The average weight and revenue per car of two trailers was 45,000 pounds and $600, respectively. During the same period 135 carload shipments in boxcars were made. The average weight and revenue were 30,000 pounds and $575, but the line-haul carrier absorbed an average charge of $56 a car for switching at St. Louis, leaving net revenue per car to the line-haul carrier of $519. In some instances, the flexi-vans used in the plan III services were leased on a one-way trip basis from New York Central Transport, which provided the drayage and cartage service at both Boston and St. Louis. Brown Shoe Company owns and operates more than 100 trailers in its interplant private-carrier operations. Some of the plants are located at distances ranging up to 260 miles apart. If and when plan III service is extended to such locations, it intends to substitute it for its private operations.

The Eastman Kodak Company has an annual movement of 32 million pounds of photographic products, equipment, and materials from Rochester, N. Y., to the Chicago area. For 35 years prior to 1945, the entire movement was in rail boxcar service. The facilities at Chicago have no rail

sidings, and from 1945 the movement was almost entirely by motor common carrier until the institution of the plan III service. Plan II has never been used. Plan III is attractive from the standpoint of cost. Reduced to a hundredweight basis, the plan III charge, plus the cost of leasing the trailers, tractor service at origin and destinations, loading and unloading, and supplementary insurance, amounts to 73.8 cents. The motor-carrier rate, plus the loading and unloading costs and other incidental charges connected with common-carrier service, total $1.189. Its use of plan III had not been substantial up to the time of hearing. It has been in the process of experimentation. It leased the flexi-vans from New York Central Transport on a one-way basis, and used the service of that carrier for the drayage at both Rochester and Chicago at an hourly charge. While rail carload service is not used to Chicago because of the lack of a rail siding, it is used to other distribution outlets where rail sidings are maintained.

The Franklin Research Company manufactures waxes, detergents, cleaners, and polishes at Philadelphia, and distributes on a nationwide basis through sales offices and public warehouses at different points. It studied the possibility of reducing warehousing costs by the use of private carriage. Plan III offers the same results. The cost for the use of plan III on this traffic is calculated to be 92.15 cents per 100 pounds. Plan II and motortruck rates are 96 cents on cleaners and soaps and $1.11 on buffing compounds.

The Carrier Corporation ships air-conditioning equipment from Syracuse to points throughout the United States, including Cleveland, Ohio, and Detroit, Mich., by motor carrier. It has considered the use of private transportation to the latter points, for which it estimates costs of 38.5 cents a truck-mile. Despite the savings, it has not entered into private carriage.

Stokeley-Van Camp, Inc., distributes canned foodstuffs from its warehouses, including those at Indianapolis, Ind., Curtice (Toledo), Ohio, and Trenton, N. J. From its Indiana and Ohio plants it ships to eastern points, including a Trenton warehouse, and from its Trenton plant it ships to points in Indiana and Ohio, including the Indianapolis and Toledo warehouses. Shipments are made both by railroad and private truck. It is particularly interested in plan III between Philadelphia and Indianapolis and Toledo, which would enable it to eliminate its over-the-road operation even with a somewhat higher cost than by private truck. Based upon the records of its private-carriage operations, it estimates costs of about $184 for the movement of a trailer load of 33,000 pounds for the distance of 680 miles. At the time of hearing, plan III rates were not in effect between Indianapolis and Philadelphia, but using the basis of 50 cents a car-mile, the per car charge for two trailers would be $362. To this must be added the terminal plant-to-ramp operations, which would increase the total cost to $496, or an average of $248 a trailer. Reduced to a hundredweight basis, the cost would be 71 cents, as compared with the rail boxcar rate on canned goods of 73 cents, minimum 60,000 pounds.

The Dairymen's League Cooperative Association, Inc., is organized under the Agricultural Marketing Act. It has a membership of about 20,000 farmers. Its operations are generally conducted between Vermont, Massachusetts, Connecticut, New York, New Jersey, and Pennsylvania. The principal commodity is fluid milk, the motor-carrier transportation of which is exempt from rate and operating authority regulation under section 203(b)(6) of the act. It is interested in plan III or IV, primarily the latter because of the railroad-furnished flatcar equipment which it needs under plan III is not readily available. It urges that the railroads should have sufficient freedom to provide the rates and service necessary to compete with the

exempt haulers, and that exempt for-hire haulers should be prohibited from using plans III and IV. Fluid milk would be shipped in tank vehicles on flatcars. The association has been negotiating with the Lackawanna and the Erie.

The Lincoln Electric Company of Cleveland submitted no evidence, but on brief it contends that we should reject all evidence which seeks to establish any kind of a class-rate yardstick to be applied to the rates at issue, because the latter cover only the lesser portion of the total cost to the shipper. It urges that it would be both unrealistic and unlawful to reject the rates and charges on the ground that they take traffic away from the motor carriers.

With respect to the rates and charges in the western cases, the freight forwarders have been making increased use of the plan IV service between Chicago and California since it began in August 1958. It offers the same economies in terminal handling, reductions in loss and damage claims, and improvement in service as have been experienced with plan III service in official territory. Forwarders are loading trailers at origin in a manner which enables destination delivery from the line-haul trailers, thus eliminating additional handling and delay.

The loading of trailers of Universal Carloading at Chicago is performed by the Burlington and the Santa Fe at a charge of 42 cents per 100 pounds. The loading and unloading of the trailers onto and from the flatcars are performed by a subsidiary of the railroads at Chicago under contract with Universal, or one of the other subsidiaries of the United States Freight Company. The movement of the trailers between the freight house and trailer ramps is performed by the freight forwarders. Universal has not used plan IV from Chicago to the Pacific north coast points, the rates therefor being under suspension at the time of hearing. It has, however, shipped

traffic from north coast points to San Francisco and possibly to Los Angeles, and from the latter points used the plan IV service to Chicago.

The Pacific Coast Wholesalers' Association is a nonprofit corporation, with a membership of 68 wholesale dealers in auto parts, hardware, and machinery located in the principal cities of the Pacific coast. It consolidates less-than-carload shipments of its members' freight into carloads at New York and Chicago, and arranges for the transportation of such carloads to the Pacific coast where the shipments are distributed by truck. The members thus receive the benefit of carload rates. All of the traffic moves westbound, and it amounts to approximately 1,700 carloads a year. It has investigated the possibility of using the plan IV rates, and has found that equipment is difficult to obtain. One railroad offered to help it arrange for cars, but after several weeks reported that it had no success. On the basis of quotations for the rental of freight cars and trailers, the movement of the trailers between the freight houses and the railroad ramp locations, and the loading and unloading of the flatcars, it estimates the cost as $1.8[illegible] per 100 pounds between Chicago and the Pacific coast if the trailers contain between 60,000 and 80,000 pounds. If required to move empty trailers eastbound, its costs would be $3.79 per 100 pounds. About 90 percent of its freight consists of articles on which the rates range from $2.05, minimum 50,000 pounds, to $4.08, minimum 40,000 pounds. The weighted-average rate was $3.50 for 1958, and $3.35 for the first quarter of 1959.

It argues that the plan IV charge, when expanded by the estimated costs of a shipper whose traffic moves only in one direction, would be unattractive and uneconomical. It believes that its traffic is not unlike that of most other shippers who are not freight forwarders or consolidators, and that their traffic, by the nature of their business, moves only in one direction. It submits that the plan IV

rates, however compensatory and otherwise justifiable, are unduly discriminatory by reason of the conditions prescribed for their application. It requests us to find that the plan IV charge is not suitable for the use of any individual shipper moving traffic in only one direction because it does not have the necessary equipment and cannot solicit freight in the reverse direction to balance operations. The cost of providing equipment and paying for its movement empty, when added to the charge for the loaded movement, would make the overall transportation cost higher than that now borne by shippers under other tariff rates.

The only other shipper which submitted evidence in the western cases was the Military Traffic Management Agency, and its evidence and position were the same as in the eastern cases. No shipper appeared in the B. & O. cases.

COSTS

Plans III and IV costs in No. 32533.—Both Eastern Central and the railroad defendants presented cost data predicated on public statement No. 5-58, "Rail Carload Cost Scales by Territories for the year 1957," prepared by our cost finding section. The costs were computed by using the Rail Form A formula applied to the eastern district unit costs for plan III movements in official territory, and the eastern unit costs east of St. Louis and the western-district unit costs from St. Louis to the Texas points for movements to the Southwest.

Eastern Central adjusted the 1957 costs to the November 1, 1958, wage and price levels, and, on brief, restated the costs to the January 1, 1959, wage and price levels. The railroads adjusted the service unit costs of statement No. 5-58 to the operations of the individual railroads in the handling of piggyback traffic. The results for each railroad, except the New York Central, were consolidated and adjusted by an overall projection factor of 6.3 percent

to reflect wage and price levels as of January 1, 1959. The New York Central's results were presented separately for the year 1957, without adjustment to reflect current wage and price levels. In the appendix hereto the restated costs submitted by Eastern Central are compared with the consolidated plan III costs of the railroads in tables I and II, the plan III costs of the New York Central in table III, and the consolidated plan IV costs of the railroads in tables IV and V.

Eastern Central's cost data for plan III shipments were computed on the basis of 70,000 pounds. The railroads determined the average weight of shipments moved during the week of November 9-15, 1958. The weighted-average load was 26,537 pounds a trailer, or 53,074 pounds a flatcar, which was rounded to 53,000 pounds to compute the costs of the railroads, except the New York Central, under plans III and IV. During November 1958, the New York Central's average loading of 780 flexi-van shipments under plan III was about 14 tons, or 56,000 pounds per flexi-van car, and it used that factor.

There is considerable variation in the tare weight of the trailers other than flexi-vans. Eastern Central used 11,500 pounds a trailer or 11.5 tons a car loaded with two trailers. The railroads used a weighted average of 10,636 pounds a trailer, developed in a study of nine railroads, rounded to 11 tons a car. The difference of 1,000 pounds has little effect upon the costs. The tare weights of flexi-vans and of flatcars, used by Eastern Central and the railroads, were the same.

The average weight of trains handling piggyback traffic on individual railroads ranged from 2,758 to 5,439 tons. Eastern Central first based its computation on trains of 2,626 tons, 75 percent of the territorial weight used for the eastern district in statement No. 5-58, but on brief it computed the costs on the basis of a train weight of 3,890 tons, the simple average of the individual railroads' train-

weight studies, excluding the New York Central. For the latter, Eastern Central computed the costs on a train weight of 4,095 tons, developed by that railroad's study. On most New York Central trains handling flexi-van cars, four diesel units per train are used. On some divisions of other railroads, three and four diesel units are used on trains that consist partly of piggyback cars. In its restatement, Eastern Central made adjustments to reflect four diesel units a train-mile on the New York Central, and 3.5 diesel units a train-mile for the other railroads. The railroads used the territorial average of 2.5 units. Both the train weights and the number of service units exceed the territorial average. The 3.5 diesel units used by Eastern Central are high because the number ranges from one to four. Since this traffic is intermingled with other traffic handled in the territory, the service units of the territory are more representative.

The railroads conducted special studies at the various piggyback terminals to develop the switch-engine minutes per loaded flatcar for each terminal. These minutes were multiplied by the unit costs to produce a switching cost per car. The time ranged from an average of 3 to 36 minutes a loaded car at origin and from 3 to 18.44 minutes a loaded car at destination, or 10 to 60 percent of the eastern-district average for all traffic. Eastern Central computed terminal switching time at 45 percent, or 14 minutes, of the territorial average of 31.1 minutes in the eastern district, and 65 percent, or 17.4 minutes, of the territorial average of 26.8 minutes in the western district. These percentages are based on switching factors developed by the railroads in I. and S. No. 6834, Piggyback Rates Between East and Texas,[8] adjusted to include nonproductive time. Certain of the railroad terminal studies

[8] Embraced with I. and S. No. M-10415, *Commodities—Pan-Atlantic S.S. Corp.*, 313 I.C.C. 23 (report on reconsideration), decided December 19, 1960.

did not include nonproductive time of switch crews, and certain others showed nonproductive time ranging from 3.75 to 12 percent. Eastern Central advocated a factor of 12 percent for nonproductive time. The deficiency in the railroads' studies results in an insignificant understatement of their costs.

The railroads adjusted the territorial unit costs to reflect the number of intermediate switches reported by individual railroads, ranging from none to 2.5 intratrain or intertrain switches. This count was based on the premise that an intermediate switch was to be counted when the cars of the particular traffic under study required an intertrain switch or there was a full reclassification of the train. If caboose changes are not considered in the category of intratrain and intertrain switching, then a separate item of expense for this service should be included; otherwise the full actual switching time and expenses will not be accounted for in the intertrain and intratrain switching costs. Eastern Central used the territorial average of an intratrain or intertrain switch for each 200 car-miles, which recognizes the full switching expenses of the railroads. It does not appear, however, that the deficit in the railroads' study would make a significant change in the ultimate costs.

Eastern Central used a 41-percent empty return ratio, the ratio for boxcar traffic in the eastern district. This ratio was used on the assumption that piggyback traffic is normally handled in boxcars, and that over a long period piggyback cars would have the same empty-return characteristics as boxcars. The railroads developed data for periods of 1 or 2 weeks in November 1958, applicable to either plan III service or to all piggyback operations, to determine the ratios of individual carriers, which were then applied to movements between t[illegible]astern points and Chicago and East St. Louis. The ratios ranged from 1.17 to 31.91 percent, with 6.4 and 2.7 percent for the New York

Central and Pennsylvania, respectively. Because the plan III charges apply on empty trailers, as well as freight-laden trailers, cars containing empty trailers were considered as loaded cars. In some instances the movement of only one trailer on a two-trailer car was counted as a loaded movement. Also, the practice of the railroads in leasing trailers to shippers in order to balance their plan II movements reduced the New York Central's flexi-van empty-return ratio from 20 to 6.4 percent, and the Pennsylvania's plan II empty-return ratio from 11.6 percent in June 1958 to 7.3 percent in February 1959. In plan IV, since the shipper must pay the same charge each way on a round trip basis, so far as the railroads are concerned there is no empty-return movement.

Eastern Central contends that a correct allowance for empty-return movement is not to be found in the relatively brief time the piggyback service has been in existence, and that a discontinuance of the trailer leasing practice for the purpose of balancing plan II movements would increase the ratio of empty movement. In *Trailer-on-Flatcar Rates, New York Central R. Co.*, 308 I.C.C. 213, division 2 accepted as a reasonable estimate the empty return ratio of 6.4 percent for flexi-van cars in lieu of the 41 percent eastern-district average for boxcar service. There are sufficient differences in equipment requirements and traffic movement between piggyback and boxcar services to discount as too high the use of the boxcar average.

The direct costs of each railroad, except the New York Central, for moving trailers between the parking areas and the loading ramps; and loading and securing them on the flatcars, ranged from $6.81 to $33.63 a car. The five railroads, except the New York Central, which terminate piggyback traffic at Chicago and East St. Louis had costs ranging from $2.01 to $42.43 a car for untieing and unloading trailers, including the movement of the trailers from the rail cars to the parking areas. These costs include

allowances for transportation and general overhead. The New York Central determined its costs at origin and destination at $12 a car, which, as adjusted and used by the complainant to include allowances for transportation and general overhead, are $14.70 a car.

Eastern Central points out that the railroad studies are deficient in certain respects. In some instances, for example, the time charged to tiedown operations was based on stopwatch observations rather than total time chargeable to the operation, such as waiting time and time spent by station forces in moving to and from loading platforms On the other hand, the studies of the Baltimore & Ohio included time not chargeable to the operations, and a comparison of the costs of that road with those of the other railroads indicates an overstatement of the Baltimore & Ohio's tiedown operations. Eastern Central used the arithmetical average of the individual costs of the railroads, other than the New York Central, which is $16.78 a car.

For a loss and damage claim factor Eastern Central originally used the nationwide average of $61.25 a car for freight-forwarder traffic, as shown in statement No. 5-58. In its restatement, it reduced this amount to $30.62 or 50 percent of the average. The railroad's expenses for loss and damage were developed by a study and ranged from 21 cents to $6.82 a car. It was developed in Nos. 33021 and 33233 that the Baltimore & Ohio's loss and damage experience for all trailer and flatcar movements for the 46 months from January 1, 1956, to October 31, 1959, was $5.02 per car, or an average of about 13.8 cents a ton. Loss and damage experience under plan IV service for the 4-month period from November 1, 1959, through February 1960, was much lower, averaging only about 3 cents a ton. In the rail study the individual loss and damage expense of each railroad was included, and on joint-line routes the expense for each participating road was

weighted according to mileage under plan III. Average loss and damage clerical costs were also included, based on statement No. 5-58. The New York Central made no allowance for loss and damage expense for the reason that no claims have been paid on its flexi-van traffic. The southwestern railroads did not submit their loss and damage experience since there had been no plan IV movement on their lines. Under plans III and IV, loss and damage are minor. The railroad responsibility for loss and damage commences with the delivery of the trailers to the rail ramp at origin and terminates when the trailers are delivered to the consignee at the rail ramp at destination.

As indicated, there are deficiencies in the cost data of both Eastern Central and the railroads. The former made adjustments which tend to overstate the costs, and the adjustments made by the railroads tend to understate. However, even complainant's cost data for shipments of 70,000 pounds, shown in tables I through V, with the exception of movements between Chicago and Philadelphia and between East St. Louis, on the one hand, and Boston and Philadelphia, on the other, over four-carrier routes (tables I and II), indicate that the plans III and IV charges set forth therein exceed out-of-pocket costs and provide a contribution to the overhead burden. A similar showing is made with respect to plan III charges in the costs restated by us set forth in table VI, except between Springfield, Mass., on the one hand, and Chicago and St. Louis, on the other, hereinafter discussed. Likewise, such a showing with respect to plan IV charges is made in the costs set forth in table VII submitted by the railroads and in all of the costs set forth in tables VIII and IX (50,000 pounds), which include those submitted by the respondent and protestants and restated by us. For shipments of 53,000 pounds, it is shown that the plan III charges will exceed the out-of-pocket costs submitted by protestants by percentages ranging from 35 to 79 for the

movements listed in tables I and II, and the rates also exceed the fully distributed costs by amounts ranging up to 30 percent, except for the circuitous routes between Springfield, Mass., and Chicago and East St. Louis. On these movements the rate fails to cover the fully distributed costs by 2 percent and 1 percent, respectively. The Erie's operating witness testified that severe weather conditions were experienced during the switching study at Chicago, and the New Haven had a low volume of cars handled in the study at Springfield, thus contributing to the failure of the shipments from Springfield to cover fully distributed costs.

The charges for flexi-van service for movements of 56,000 pounds shown in table III exceed the out-of-pocket costs by amounts ranging from 102 to 130 percent, and exceed the fully distributed costs by 35 to 50 percent. Tables IV and V show that plan IV charges for movements of 53,000 pounds exceed the out-of-pocket costs by 82 to 99 percent, and exceed the fully distributed costs by 22 to 32 percent.

Plan III costs in I. and S. No. 7022 and No. 32531.—Table VI of the appendix is a comparison of the costs submitted by the railroad respondents and Eastern Central for handling plan III traffic in connection with the provision for the substitution of two short flatcars in lieu of one long flatcar. The railroads' costs are computed on a basis of actual loading in trailers ranging from 53,000 to 61,650 pounds. The costs are restated by us to the January 1, 1959, wage and price levels, except for the Baltimore & Ohio which had made that adjustment. Adjustments to the costs in statement No. 5-58, similar to the two-trailer-per-car adjustments, were made on the basis of studies of handling the traffic, average train weight, empty return of cars and trailers, single-line movement, intermediate or intertrain switching origin and destination switching, freight claim experience, and loading and

unloading, including the fastening and unfastening of the trailers. The Baltimore & Ohio's costs omitted switching time for changing cabooses, which was stated to be 37 cents a car. This amount has been included in the restated costs shown in table VI. The costs for the single-trailer loading also did not include allowances for loading, tie-down, untying, and unloading trailers, which were included by the same railroads in the two-trailers-per-car movement, and the restated costs include an allowance at origin and destination for those services at the terminals concerned.

The costs submitted by Eastern Central were computed from the 1957 cost data adjusted to the wage and price level of November 1, 1958. They differ from the railroads' costs in the load factor used, in addition to the differences in treatment described in connection with the two-trailer-per-car movements. Like those previously considered, the costs are understated by the railroads and overstated by Eastern Central. The charges exceed the out-of-pocket costs by amounts ranging from 3 percent to 27 percent, except for the circuitous route from Springfield to Chicago and East St. Louis, for which it is indicated that the charge fails by 9 percent and 3 percent, respectively, to cover the out-of-pocket costs. It is noted that those restated costs exceed the corresponding cost from Boston, about 100 miles more distant. The costs at Springfield reflect the data of record, including loading and tie-down expense of $31.70. The average loading and tie-down expense of all railroads is $16.78 per car. Also, the switching cost at Springfield is unusually high because of the few cars handled during the test week. The factors referred to cast considerable doubt on the validity of the Springfield data, and suggest that normally the total cost would be somewhere between that from Boston and that from Hoboken, N.J., to Chicago and East St. Louis.

Plan IV costs in I. and S. No. 7040.—Both the Baltimore & Ohio and Eastern Central submitted costs which were

computed from the unit costs in statement No. 5-58, with adjustments to cover costs for shipments of 50,000 and 70,000 pounds under plan IV for two containers on one flatcar. Because the Baltimore & Ohio traffic moving at the plan IV rates is at present largely that of the freight forwarders, Eastern Central used the loss and damage claim payment of $1.75 a ton on that traffic. The Baltimore & Ohio insists that its claim-payment costs of 16 cents a ton on piggyback traffic would be more representative, and it restated Eastern Central's data to reflect that factor. This restatement would reduce the costs for shipments of 50,000 and 70,000 pounds by $39.73 and $55.63, respectively. There are other differences between the studies, such as the weight of the train, intertrain switching, terminal switching, and other operation factors. Both studies show, however, that the rates and charges in this proceeding exceed the out-of-pocket costs and make a contribution to the constant costs.

Plan IV costs in Nos. 33027 and 33233.—These proceedings concern plan IV rates, among others, minima 50,000 and 70,000 pounds, between Jersey City, Philadelphia, Baltimore, and Washington, on the one hand, and Chicago and East St. Louis, on the other. In tables VIII and IX of the appendix, comparison is made of the out-of-pocket costs as submitted by the Baltimore & Ohio and the protestant motor carriers, and as restated by us. These costs are computed for the 50,000-pound and the 70,000-pound charges. The studies of the respondent and protestants were based on the costs for the eastern district as shown in statement No. 5-59, with adjustments to reflect the increased wage and price levels as of October 1, 1959. There is no disagreement as to the use of an index of 103.1 percent for that adjustment.

The motor carriers differ with the railroad's costs in three important respects. The Baltimore & Ohio costs omitted an allowance for placing the empty rail cars at

origins and the loaded cars at destinations. The record provides no factual basis for separately computing such costs, and the railroad's switching costs at origin and destination will be used. In computing line-haul costs, the motor carriers used four diesel units per train. Based on the distances and the number of units here involved, the weighted-average number of units per train will range from 3.3 to 3.6. For the purpose of restating the line-haul costs, the use of 3.5 diesel units per train appears justified.

The Baltimore & Ohio showed a cost of $5.02 per car for loss and damage, and the motor carriers contend it should be $29.60 per car. The railroad based its loss and damage expense on its actual experience for all trailer and flatcar movements for the 46 months from January 1, 1956, to October 31, 1959. The motor carriers based their figure on the assumption that most of the plan IV traffic in issue would be handled for freight forwarders, and that the loss and damage expense should be 50 percent of that attributed to freight-forwarder traffic in the eastern district. The 50 percent item is not supported by any special study or other probative evidence. Since the Baltimore & Ohio's cost of $5.02 per car is based on actual experience, it will be accepted.

As shown in tables VIII and IX, the plan IV rates exceed the out-of-pocket costs in all instances, the 50,000-pound charges by percentages ranging from 33 to 60, and the 70,000-pound charges from 27 to 62. These percentages indicate that substantial contributions will be made to the transportation burden.

Plan IV costs in I. and S. No. 7034 and Nos. 32543 and 32546.—The respondent railroads submitted cost data which were prepared by making adjustments in the territorial costs for the western district, as shown in statement No. 5-58, for the purpose of reflecting the operating characteristics of plan IV traffic whenever conditions vary

from the average for that district. Costs for 1957 were adjusted to the January 1, 1959, wage and price levels by increasing them 6.7 percent.

The line-haul costs were based on those for through trains and the use of cars in piggyback service. Tare weights of the cars were obtained from car manufacturers and the tare weights of the trailers were obtained from the different respondents. The tare weights of the trailers ranged from 10,400 to 11,800 pounds, and for the purpose of the study 11,500 pounds a trailer, or 23,000 pounds for two trailers on a flatcar, was used.

The costs from statement No. 5-58 include, in the car-mile portion of the line-haul running expenses, the costs associated with the ownership of flatcars, such as return on investment, depreciation, repairs, and maintenance. The respondent railroads eliminated the 64-percent empty return ratio of flatcars from the line-haul expenses. The unit costs as adjusted were applied to the average of the actual route-miles between the origins and destinations. The average mileages were rounded out by mileage blocks ranging from 2,200 to 2,740 miles. In table VII of the appendix are shown the costs as computed by the railroads and the percentages which the charges are of the out-of-pocket costs. Therein it is shown that the charges will exceed the out-of-pocket costs of handling the traffic in the three types of cars in percentages ranging from 118 at 2,200 miles to 53 at 2,740 miles.

FREIGHT-FORWARDER VOLUME COMMODITY RATES

The issues raised with respect to the assailed freight-forwarder rates are (1) whether they apply to and are a part of a service which does not fall within the definition of freight-forwarder service under section 402(a)(5); (2) whether they are unreasonably and unjustly low in violation of section 404(a); (3) whether they result in undue and unreasonable preference and advantage to the points,

localities, regions, and descriptions of traffic between and to which they apply, and in undue and unreasonable prejudice and disadvantage to other points, localities, regions, and descriptions of traffic in violation of section 404(b); and (4) whether they constitute a competitive practice destructive of motor-carrier service contrary to the national transportation policy.

The assailed freight-forwarder volume commodity rates are all subject to a minimum of 10,000 pounds and over. Generally, they are on the same level as the rates maintained by the principal motor carriers, which, as above indicated, are constructed on the same level as the railroad plan II rates. In some instances, the forwarder rates are slightly higher than the motor-carrier rates; in others they are somewhat lower. For example, on printed advertising matter from Providence, R.I., to Chicago, the assailed freight forwarder rate of $2.60, minimum 18,000 pounds, is the same as the motor-carrier and plan II rates; on bicycles, n. o. i., from Chicago to Boston, the assailed forwarder rate is $3.21, minimum 15,000 pounds, whereas the motor rate is $3.61, minimum 16,000 pounds, and the plan II rate is $3.25, minimum 16,000 pounds; and on boots and shoes, from Binghamton, N.Y., to Chicago, the assailed forwarder rate is $3.49, minimum 11,800 pounds, and the motor and plan II rates are $2.08, minimum 14,000 pounds.

Eastern Central concedes that the assailed forwarder method of ratemaking was found lawful in *Eastern Central M. Carriers Assn., Inc.*, v. *ABC Freight*, 300 I.C.C. 733, and it does not here desire to relitigate that matter. It contends that the assailed rates should be considered in the light of their effect upon the national transportation system, with full regard to the fact that by their very nature freight forwarders concentrate their operations in and offer their services between centers of population, leaving the underlying carriers the task of providing service for the remainder of the public.

Freight-forwarder volume rates are not new. The majority, if not most, of the assailed rates were established prior to the institution of the so-called piggyback plan III service. They were established to apply between points where traffic was actually known to be available for movement. Similarly, many motor-carrier commodity rates apply only between points of actual movement.

Eastern Central introduced data as to the cost of handling forwarder traffic, as follows: The aggregate operating expenses of the forwarders for the first quarter of 1958 were divided by the total tonnage received from shippers, to compute an average cost of $26.7916 a ton or $1.34 per 100 pounds. The applicable rail linehaul rate and an amount for the cost of pickup and delivery service were added to the operating cost per 100 pounds to determine the cost of handling their freight by rail. Pickup and delivery costs were obtained from statement No. 6-56, "Cost of Transporting Freight by Class I Motor Carriers of General Commodities—Middle Atlantic Region—1955, New York-Philadelphia Carriers," compiled by our cost finding section. The costs in this statement were increased 50 percent to give effect to increases in wages and prices, 1955 to 1958, and to allow for profit above the cost of performing the service that the motor carriers would be expected to include in their charges to the freight forwarders. The costs so determined were aplied to 22 commodities moving from 31 origins to 35 destinations concerning 42 rates. The cost data show that 6 of those rates were above and 36 were below the fully distributed costs, but all were above the out-of-pocket costs.

Cost data submitted by the forwarders, for the handling of 25,000 pounds in their highway trailers as plan III shipments, are the same as those in *Forwarder Volume Commodity Rates, Chicago and New York*, 308 I.C.C. 45. 310 I.C.C. 199 (on reconsideration). Therein, we concluded that the considered rates were compensatory. The evi-

dence before us here supports a like conclusion. In that proceeding, now pending in the courts, the motor carriers contended that freight forwarders should not be permitted to establish rates designed to attract volume shipments because such service is outside their normal sphere of assembling and consolidating small shipments, and would give rise to destructive competition contrary to the national transportation policy. We there found that there is nothing in the legislative history of the act, including section 402(a), which prohibits forwarder rates subject to minimum weights such as those here considered, or which confines the forwarder's business to the handling of small shipments; and also that if a forwarder can handle several small shipments of the same aggregate weight, the shipping public should receive the benefits flowing from that fact. The same conclusions are warranted here.

It is also argued that freight forwarders cannot lawfully utilize either plan III or plan IV services because under section 418 of the act they are "prohibited from supplying an instrumentality of line-haul transportation." A similar argument with respect to plan III service was made in the proceeding cited above, now in the courts, in which it was observed that the prohibition in section 418 is against the use of instrumentalities or services of *other* than common carriers; in other words, that the line-haul transportation could not be performed by *contract* carriers. Neither the trailers or containers under plan III, nor the trailers and the flatcars under plan IV, are instrumentalities which the railroads hold themselves out to furnish, and thus are not instrumentalities by means of which they perform the transportation. Reference in connection with the above argument to *Allowances for Use of Trailers*, 299 I.C.C. 513, is not apt because that proceeding concerned plan II service in which, as previously described herein, the railroads hold themselves out to provide a complete door-to-door service, including trailers and flatcars.

DISCUSSION AND ULTIMATE FINDINGS

In their reply to the railroads' exceptions, certain of the motor-carrier interests state:

> The issue here presented is simply a question of whether the means which the railroads have chosen for rendering less than a complete TOFC service are lawful.
>
> * * * * * * * * *
>
> It is the contention of the motor carrier protestants that in view of the provisions of the Interstate Commerce Act requiring the railroads to furnish the instrumentalties of transportation, to strictly observe their published tariff charges, and permitting them to compensate shippers through allowances published in tariff form for rendering some portion of the service which the railroads are obligated to perform, the instant proposals are unlawful.

In substance, the examiner concluded in the proposed report in the eastern and western cases that the railroads, having established plan II rates and charges for a complete, door-to-door TOFC service, may provide lesser services only by publishing tariff allowances to shippers who furnish a part of the instrumentalities and services which the carriers otherwise are obligated to furnish. Eastern Central insists that there is no justification for the maintenance of two sets of rates, one contemplating the provision of all instrumentalities and services and the other contemplating the furnishing of certain instrumentalities and services by the shipper.

We are not in agreement with that position. The argument draws its principal support from evidence that under plan III and plan IV operations there has been some direct and indirect leasing of trailers and cars by certain railroads to shippers and the performance of loading and

unloading of lading into and out of trailers, or of drayage services at negotiated charges. In any instances in which the carriers, having established plan II rates, performed a complete door-to-door service and charged only plan III or plan IV rates, the latter obviously were inapplicable and the railroads should collect undercharges on the basis of the applicable plan II rates and charges. While the furnishing of services which they do not hold themselves out to perform can be the source of illegal rebating by carriers for which they are liable to prosecution under the Elkins Act, nevertheless it cannot be said that carriers are barred from publishing rates for less than a so-called complete service. Many motor carriers, for example, publish rates subject to consignor loading and consignee unloading which services are normally included in motor rates. The fact that rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a lower rate. Nor, when that is done, can it be said that the carrier is "obligated" to do more than it has offered to do for the lower rate where such offer at the latter rate is accepted by the shipper. With respect to "allowances," obviously none can be made to the shipper for performing a service the avoidance of which is the consideration for the lower rate.

"In *Automobiles from Evansville, Ind., to the South*, 245 I.C.C. 339, 346, a motor-carrier contention that reduced rail rates for station-to-station service, intended to compete with truck transportation by considering the shipper cost of loading and unloading rail shipments, constituted unlawful concessions because they compensated the shippers by way of differential rates "for the performance of noncarrier services," was rejected. Referring thereto in rejecting a similar contention in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 531, the Commission stated: "Differences in rates are entirely unlike allowances or rebates. * * * The methods employed by a carrier to meet competition are primarily a matter of mana-

gerial discretion, rather than regulation, so long as they are lawful." On the other hand, in *Allowances for Use of Trailers*, 299 I.C.C. 513, 515-516 (on reconsideration), wherein a proposed allowance for the use of a shipper-owned trailer, and for the performance of pickup and delivery and loading and unloading services was disapproved on other grounds, we observed:

> *the respondent holds itself out, in the tariff of which the proposed items is a part*, to furnish a complete door-to-door trailer-on-flatcar service on this traffic, for which trailers of the kind comprehended by the proposed item are needed as a part of the respondent's common-carrier equipment. • • •
>
> A trailer need not be furnished by the shipper in transporting his goods, but, *under the respondent's tariff*, it is a part of the equipment of carriage which the respondent holds itself out to furnish. Thus, a shipper-owned trailer is a transportation instrumentality, as that term is used in section 15(13) of the act, for which a reasonable allowance may be made by the carrier. [Emphasis added.]

More recently, in *Forwarder Volume Rates, Chicago and New York*, 308 I.C.C. 455, 461,[9] referring to the case and the discussion quoted next above, the following distinction was made:

> Here, under the plan III rates, the shipper is required to furnish the trailers; there is no holding out by the rail lines to furnish them, and their rates apply on the empty as well as on the loaded trailers. In *Vehicle Container Rates in Southwest*, 196 I.C.C. 127, rates were proposed on loaded or empty trailers or semi-trailers which were considered as containers or arti-

[9] The report on reconsideration, 310 I.C.C. 199, affirmed the finding in the respect referred to above, without discussion.

> cles of commerce, since they were to be furnished by the shippers and charged for whether loaded or empty.

While section 1(3) defines "transportation" as including "all instrumentalities and facilities of shipment or carriage, irrespective of ownership * * *, and all services in connection with the receipt, delivery, * * * and handling of property transported," and section 1(4) provides that it is the duty of a railroad "to provide and furnish transportation upon reasonable request therefor," the transportation subject to regulation under the act has been held by the Supreme Court to begin "when the merchandise has been placed in the possession of a carrier." *Pennsylvania R. Co.* v. *Ohio Public Utilities Comm.*, 298 U.S. 170, 174. Under the tariffs, the shipments do not come into the possession of the carriers until the loaded trailers in plan III are placed at the ramp areas, and the loaded flatcars in plan IV are available for line-haul movement. In *Walling* v. *Baltimore Steam Packet Co.*, 144 F. (2d) 130, 134, the court said:

> The phrase "services in connection with" is used in sections 1(3), 6(7) and 15(13) of the Interstate Commerce Act * * * and, as so used, it has uniformly been construed to mean service rendered *while a shipment is in the custody and control of the carrier or service which the carrier is legally obliged to perform.* [Emphasis added.]

The motor-carrier interests except to the examiners' failure to conclude specifically that the assailed rates and charges violate the provision of section 1(6) to the effect that it is the duty of carriers "to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed * * *." Although rates on trailers and containers, and all-

commodity rates, had been approved in prior proceedings, the first discussion of the contention thus made in any detail was set forth in *All Freight from Eastern Ports to the South,* 245 I.C.C. 207, in which, at pages 228-229, division 3 observed:

> acceptance of all-commodity rates, such as here proposed, as a classification of property such as is required by section 1(6) of the act would be diametrically opposed to the heretofore accepted principles of classification and do violence to the supposedly "fair relation" upon which the classification is based.
>
> Section 1(6) of the act, as previously noted, requires that all classifications of property shall be just and reasonable. Therein lies the crux of the issue here presented. It is obvious that, in publishing the all-commodity rates under suspension, respondents have departed radically from the traditional system of freight classification which they have heretofore observed on this traffic and which they now observe on traffic generally throughout the territories affected. In view of the fact that the burden is upon them to justify the classifications which they propose as well as the rates, it is reasonable in such circumstances to expect to find in the record substantial evidence to support the particular method of classification here proposed. The evidence on this point, however, is not substantial, and, in our opinion, it falls far short of establishing the justness and reasonableness of the classification represented by the all-commodity rates.[10]

Certain aspects of the proceeding just cited deserve notice. As indicated above, all-commodity carload rates were not found to violate section 1(6) per se. There was

[10] In the report on reconsideration, 251 I.C.C. 361, there was no elaboration of this point.

emphasis that the proposal was aimed primarily at obtaining the traffic of one forwarder which was moving by truck under a suspect joint arrangement, and the respondents admitted that if the forwarder were "compelled to pay legal rates, there would be no existing competition necessitating the establishment of the all-commodity rates" (251 I.C.C. 361, 365). Much of the traffic of a mail-order shipper which participated in the proceeding was moving in rail service, and with respect to diversion to private carriage, it was noted that "conditions have changed so materially that it is doubtful whether the inauguration of private-truck operations by it is now feasible [1942]."

The same argument against all-commodity rates was considered in *All Freight to Pacific Coast*, 248 I.C.C. 73 (report on further hearing), in which the Commission stated (pages 86-87):

> Class rates normally reflect the maximum of reasonableness on goods falling within the various classes of traffic. Commodity rates are established, and necessary or desirable exceptions to the classification are made, when circumstances and conditions suggest that the class basis is too high for application on the traffic. We have approved this basis of rate making, and have never required commodity rates to conform to the ratings of the classification. • • •
>
> The public is primarily interested in the charge for the service, irrespective of whether a rate is stated as a class or commodity rate. All rates are required to be just and reasonable, nondiscriminatory, and nonprejudicial. To require carriers to maintain rates only on a classification basis would make section 1(6) paramount to all other sections of the act, particularly section 1(5), which requires all rates to be just and reasonable, and in this case the result would be rates

that are unreasonable under the circumstances and conditions surrounding the traffic.[11]

In *All Freight Rates to Points in Southern Territory*, 253 I.C.C. 623, investigations of both rail and motor all-commodity rates, in which principal motor-carrier tariff bureaus opposed the rail rates on the ground, among others, "that they were established to further the interests of the freight forwarders and a few mail-order and chain stores, in violation of sections 1(6), 2, and 3(1) of the Interstate Commerce Act, and were not established to meet motor-carrier competition," the Commission found, at page 631:

> Objection to all-commodity rates based on the contention that the carriers failed in their duty to establish and enforce just and reasonable classifications of property in violation of section 1(6) in situations similar to those here was considered in *All Freight to Pacific Coast*, 248 I.C.C. 73, and was not sustained. The respondent rail lines maintain a complete classification of all property, carloads and less than carloads, with many specific exceptions, including broad mixtures of differently classified articles at the same rates, and commodity rates on articles in straight or mixed carloads. They also maintain rates under rule 10 of the classification. All of these rates alternate with one another and with the all-commodity rates, and thus provide for use of the rate that will produce the lowest charge. Following *All Freight to Pacific*

[11] The decision was sustained in *Pacific Inland Tariff Bureau v. United States*, 50 F. Supp. 376, wherein at page 379 the court stated: "The facts and circumstances disclosed in the reports of the commission, with its findings and reasons therefor, convincingly negative the plaintiffs' claim of improper rate classification in the matter of approval of all-commodity rates." Commissioner Eastman's concurring expression in the cited report on further hearing, particularly at pages 88-89, is of interest.

Coast, supra, we hold that the rail carriers have not failed to establish a classification of freight as required by law.

It might also be observed that at pages 634-635 of that report the Commission quoted from a Senate committee report accompanying a bill providing for regulation of freight forwarders, with respect to section 408 relating to assembling and distribution rates, as follows:

> Nothing in the section will, of course, limit the authority of the carriers whose services are utilized by freight forwarders to establish all-commodity carload or all-commodity truckload rates with respect to any movement of property, since such rates will be available to the shippers generally and their establishment or use is governed by the principles generally applicable to the establishment and use of rates under Parts I, II, and III.

The railroads maintain a uniform classification of property, and consistent with the conclusions previously cited, we find that the assailed rates and charges do not constitute a failure to provide a just and reasonable classification under section 1(6) of the act.

It is not shown that the assailed rates and charges cause unjust discrimination or undue prejudice or preference under section 2 or 3. Those allegations are based on the unpublished rental for equipment use and charges for loading and unloading of lading into and out of trailers, and drayage services, which, as we have indicated previously, might be the source of illegal rebating for which the carriers are subject to criminal prosecution, but they do not *ipso facto* show that the carriers are demanding a greater or less compensation for a like and contemporaneous service, or are subjecting any shipper to undue or unreasonable prejudice, in connection with the

transportation they hold themselves out to perform in their tariffs. While potential unjust discrimination, in certain circumstances, might be found, the potentiality is inherent in the nature of the tariff publication, and may not rest alone on speculation. In other words, we cannot find that plans III and IV, openly published and available without collateral qualification to all shippers at the same location, are unjustly discriminatory because the opportunity exists for the carriers, outside of the tariffs, to engage in criminal rebating.

It should be observed, also, that sections 2 and 3(1) are intended to protect shippers, not competing carriers. Only one shipper, the Pacific Coast Wholesalers Association, contends that the rates and charges are unlawful ("on the grounds, set forth previously, that it could not obtain flat cars nor solicit traffic for eastbound movement to avoid empty return"). Difficulty in making beneficial use of rates or charges, however, does not establish that they are unjustly discriminatory or unduly prejudicial.

Lastly, the motor-carrier interests urge that the assailed rates and charges constitute unfair and destructive competitive practices in contravention of the national transportation policy; in short, that they are designed to destroy motor-carrier competition. In this, they advert again to the low percentage of first-class rates represented by the assailed charges reduced to a hundredweight basis, and to their assertion that the railroads will lose more remunerative rail carload shipments of high-grade traffic to plans III and IV. We are not here passing upon the wisdom of the assailed plans, but on the issue whether they are lawful under the provisions of the act which we administer. As stated in *Vehicle Container Rates in Southwest*, 196 I.C.C. 127, 136:

> Questions as to whether the service here proposed by respondent to meet truck competition is that best adapted for the purpose and as to whether, as con-

tended by certain of protestants, it would benefit freight forwarders and truck operators more than it would respondent, are not those for our decision. The decision of such questions is a responsibility of management and we are not the managers of the railroads.

Under section 15a(3), added by the Transportation Act of 1958, it is provided that the rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due effect to the objectives of the national transportation policy. The cost evidence indicates that the rates and charges exceed the cost of the services and provide a substantial contribution to the overhead burden. There is ample evidence of the large volume of intercity traffic which has been moving in unregulated carriage. Even though the freight forwarders and consolidators account for the great bulk of the traffic which moves in the assailed services, it cannot be said that much of that traffic would not be moving in unregulated transportation were it not for such services. The testimony of three motor common carriers regarding traffic lost to plan III service, partially refuted by the testimony of certain shippers, does not indicate that any of them, much less the motor common carrier industry as a whole, is in peril of destruction if the assailed plans are approved. In one instance, the carrier handled substantially more tonnage in December 1958, after the inauguration of plan III service, than in December 1957. The rates and charges considered herein, under the plans at issue, are the end result of an effort by the respondent railroads to regain traffic lost mainly to nonregulated carriage and to maintain their position as a strong partner in the national transportation system.

Upon consideration of all the evidence before us, we conclude and find that (1) the rail rates and charges on loaded or empty trailers and containers, moving in plan III and plan IV TOFC service, and the rules in connec-

tion therewith, here under investigation, and (2) the assailed freight-forwarder volume commodity rates, are lawful, or not shown to be unlawful, as the case may be.

The complaint will be dismissed, and the investigation proceedings discontinued. As indicated heretofore, the record contains references to certain questionable practices which appear to have grown in connection with the considered rates, particularly on the Pacific coast; we are directing our Bureau of Inquiry and Compliance to investigate these matters.

VICE CHAIRMAN MURPHY, whom COMMISSIONER HERRING joins, concurring:

I have no trouble in approving the plan III and plan IV services as such, nor with the finding that the assailed freight-forwarder volume rates are not shown to be unlawful. I am satisfied that the rates are compensatory and that the extremely low level of most of these rates is necessary to meet private-carrier competition over which the Commission has no control. Many of these rates have been in effect for as long as 2 years, and the motor carriers have not shown that the rates have affected them adversely to any appreciable extent. Accordingly, I feel constrained to concur in the finding that the rates and rules under investigation are not shown to be unlawful.

However, a word of caution to the respondents seems to be in order. Some of these TOFC rates are on an extremely low level, so low in fact that, because of the effect which they may have upon other rates in the general rate structure of the country, they approach the point where they may be unnecessarily destructive of competition over which the Commission has control. The respondents should keep a constant check on these rates so as to make certain that none of them will at any time drop below the level required to meet the existing competition.

This is important also to insure that these rates will not prove unnecessarily detrimental to the carload commodity traffic upon which the respondents so heavily depend for adequate revenues. Strict observance of the single commodity limitation will provide important protection against wholesale diversion of this essential traffic. Nevertheless, the rail carriers should be constantly on the alert for instances where shifts in competitive pressures may permit increases in one or more of these rates, or changes in the rules governing them, so as to avoid, where practicable any needless depletion of common-carrier revenues.

COMMISSIONER WALRATH, dissenting as to freight-forwarder volume rates and concurring in the results otherwise:

My views on freight-forwarder volume rates are set forth in my dissenting expressions in *Forwarder Volume Commodity Rates, Chicago and New York*, 308 I.C.C. 455 and 310 I.C.C. 199. Without detailing those views here, I must for the same reasons note a dissent to the extent that such rates are again upheld in these proceedings.

While it is not easy completely to divorce rail rates under plans III and IV from forwarder volume rates (since the former give practical effect to the latter), it seems clear that the legal status of one does not per se affect that of the other. In this situation, then, plans III and IV stand on their own, with only nodding reference to the fact that, under past decisions as well as here, they enable the forwarder and his exempt and questionable counterparts to undercut a basic mode of carriage between volume points, to the ultimate detriment of small cities and towns and certain classes of shippers throughout the country.

Apart from the legal objections to the nature of some "shippers" who use plans III and IV, we must recognize the realities of the overriding problem facing all common

carriers today—the heavy and increasing diversion of traffic into *unregulated* channels. It is important that management seek ways to recapture this traffic if public carriers are to improve their relative position and rehabilitate our national transportation system. Ostensibly that is the underlying purpose of the railroads' proposals here and, so long as innovations are not clearly unlawful, ingenuity should not be discouraged.

This is not to say that plans III and IV are above reproach. It is argued, for example, that the inherent mechanics of the plans lend themselves to concealed rebating and disregard of tariff rules for preferred persons. In such instances, however, prompt and vigorous enforcement action would appear to be the answer.[12]

I have not been without inclination to regard the plans as possibly unlawful because of certain collateral effects. That they have sparked the organization and expansion of questionable "shipper associations" is apparent, but here, too, the ultimate answer appears to lie in clarification of the exemption under section 402(c), and stern enforcement whenever such exemption is abused, rather than in condemnation of the plans themselves. Looking then to the real problems: In view of private and exempt competition which for a decade has been steadily eroding desirable freight from all modes of public carriage, what are the rails to do if not permitted plans III and IV?

If they held themselves to straight boxcar service, they would be "outmoded" in more ways than one. If they bowed to technological change only to the extent of providing service under plans I and II, they would be underestimating their potential for progress. They would, in

[12] A requirement that the railroads publish the charges for all services performed by them in connection with plans III and IV, including the equipment-leasing charges imposed by them and/or their affiliates, would seem to be in order; at the very least, a rulemaking proceeding is indicated.

fact, be confined, on the one hand (under plan I), to being silent partners of motor common carriers at revenues which approximate plan III revenues but which normally result in no saving to the shipper, and with tonnage substantially dependent on motor-carrier overflow (particularly under present management-labor agreements); on the other hand (under plan II), they would be restricted to terminal-area operations whose scope would not provide the volume so necessary to reduction of costs. There has recently been some progress under plan V by which certain railroads and motor common carriers hold themselves out to provide joint services at single-factor rates reflecting for the shipper some measure of the savings inherent in the operation. That such (plan V) coordinated transportation would in most cases result in "the greatest good to the greatest number," I have no personal doubt. Yet, under the statute, through routes and joint rates between rail and motor carriers are not to be forced, but are entirely optional. It may be that the time has come to change the law, but, as it stands, joint rail-motor (as contrasted with joint rail and rail-water) rates cannot be *required* even where they can be shown clearly to be in the public interest. How to bring about a desirable measure of voluntary cooperation requisite under plan V appears to be the big question defying ready solution. (Witness the controversial issues involved in the so-called common ownership bills currently pending before the Congress.)

It would seem, then, that plans III and IV are only natural consequences of the complexities of the present economic crisis confronting all common carriers, including the state of the law, the intermodal rivalry, the inroads made by various forms of exempt carriage under parts II, III, and IV of the Interstate Commerce Act, and the huge growth of private carriage as it seeks to overcome public-carrier service deficiencies and spiraling costs.

(These very factors are currently receiving detailed attention and study by the Congress.)

Motor carriers on occasion have obtained operating authorities on the premise that their services were needed to move laden trailers provided by shippers, but one of their basic arguments against plans III and IV is that if the rails use "shipper" equipment they must, under section 15(13), reflect that fact not in rates but in the form of allowances. Rail interests counter that this is a distinction without a difference and that the published rates reflect appropriate allowances. And, as the majority notes, motor rates dependent on shipper loading and unloading are not unknown. In principle there would seem to be little difference. Under plans III and IV, the railroads perform a service essentially different from that performed under their regular rates and a different basis of rates therefor is not inappropriate. It seems only fair that each mode should have reasonable freedom to approach the solution of shippers' problems within the scope of its inherent advantages.

Although the rates for plans III and IV appear to be on the low side (and I share the apprehension of Brothers Murphy and Herring on this point), it is difficult to quarrel with a level which approximates or equals the divisions received by rail from the similar service performed under plan I, and which appears to return net revenue in excess of that derived from higher boxcar rates. Despite this showing, the rates are attacked on the time-honored principle that they are destructive of freight classification. While this is traditionally a sound argument under normal competitive conditions, neither the railroads nor other public carriers can survive the reality of do-it-yourself competition unless they conquer the factors which have been diverting the high-rated traffic from them. Certainly the proprietary carrier does not concern himself with "classification" principles when he loads his own truck

(except to the extent he is willing to leave his "sand-and-gravel" freight to the common carrier!).

This is not to say that this Commission should give *carte blanche* to any proposal advanced as a method of discouraging private carriage (some remedies cure the disease and kill the patient); but it does have an obligation to meet at least halfway those proposals which seem reasonably based and whose overall effects appear to be more good than bad. We cannot in good conscience, on the one hand, urge the full use of technological advancement, and, on the other, artificially restrain the reasonable application of the fruits of that advancement to the competitive situation.

A final personal reservation, which goes not to the plans themselves, but only to the mechanics of plan IV and the extent to which "shippers" may avail themselves of its benefits, lies in the question of who may furnish rail cars for the line haul. A persuasive argument is made that a rail flatcar is an "instrumentality" of transportation "utilized" against the prohibition of section 418 of the act. The majority touches only lightly on this point and seems to assume the issue was settled in *Forwarder Volume Commodity Rates, Chicago and New York*, *supra*. In my opinion, however, this issue is still open to further consideration on an appropriate record and may even require legislative clarification.

Only time will tell whether the railrads and this decision are on the right track, but, with so many legal and economic factors favoring traffic diversion to unregulated carriage, innovation on a trial-and-error basis is the only approach which seems feasible; the crystal ball is clouded, and I confess to no greater clairvoyance than those whose very surviva' as common carriers is at stake.

Unless the Commission is to dictate carrier policy (as distinguished from "regulating" in the public interest),

measures designed to provide better and cheaper service than shippers can provide for themselves must be given a fair chance to develop. As I see it, that is the fundamental issue here. We are insufficiently informed of (i.e., more experience is needed with) the complexities of TOFC ratemaking and the effect thereof on other railroad traffic and on other carriers, and I do not believe we can afford to forego that experience by striking down the considered rates on the basis of anything on the present record.

COMMISSIONERS BUSH and TUCKER did not participate.

APPENDIX

TABLE I.—*Comparison of plan III rail rates with costs per car as of January 1, 1959, for two trailers loaded on one flatcar*

Movement between Chicago, Ill., and—	Route	Operating miles	Rate per shipment—plan III	Complainant's costs			Defendants' costs			
				Out-of-pocket	Fully distributed	Percent proposed rates of out-of-pocket cost	Out-of-pocket	Fully distributed	Out-of-pocket [1]	Percent proposed rates of out-of-pocket cost
				70,000 pounds			*55,000 pounds* [2]		*70,000 pounds*	
Boston, Mass.	NH, Erie	1,215	$494.50	$491.88	$672.14	101	$316.01	$452.80	$341.31	145
East Cambridge, Mass.	B&M, D&H, LV, NKP	1,065	494.50	.....	.....	.....	317.42	440.38	338.60	146
Springfield, Mass.	NH, Erie	1,122	445.50	.....	.....	.....	326.65	455.25	350.20	127
Jersey City, N.J.	Erie	995	451.50	.....	.....	.....	267.22	377.46	288.33	157
Do.	do	955	451.50	421.32	569.22	107	.....	.....	.....	.....
Hoboken, N.J.	DL&W, Wab	893	451.50	.....	.....	.....	295.33	398.00	314.94	143
Do.	DL&W, NKP	902	451.50	420.06	561.26	107	263.79	364.95	282.78	160
Jersey City, N.J.	B&O	997	451.50	438.50	586a	103	311.88	422.29	332.74	136
Do.	LV, Wab	951	451.50	.....	.....	.....	320.12	430.20	339.94	133
Do.	LV, NKP	952	451.50	436.99	584.30	103	285.94	393.72	304.97	148
Kearny, N.J.	PRR	895	451.50	363.25	538.67	112	252.71	349.54	271.92	166
Philadelphia, Pa.	do	830	412.50	380.79	508.09	108	241.41	332.51	259.25	159
Do.	B&O	905	412.50	406.71	543.37	101	304.25	406.56	323.31	128
Do.	RDG, WMD, P&WVA, NKP	861	412.50	434.64	580.5	95	272.91	378.50	290.43	142
Baltimore, Md.	B&O	810	398.50	.....	.....	.....	274.35	368.29	291.56	137
Do.	WMD, P&WVA, NKP	764	398.50	.....	.....	.....	235.60	331.50	251.06	159
Washington, D.C.	B&O	773	398.50	.....	.....	.....	256.60	347.27	273.09	146

[1] No fully distributed costs computed by defendants.
[2] Average weight of plan III TOFC shipments handled by nine railroads during study week November 9-15, 1958.

TABLE II.—*Comparison of plan III rail rates with costs per car as of January 1, 1959, for two trailers loaded on one flatcar*

TABLE II.—*Comparison of plan III rail rates with costs per car as of January 1, 1959, for two trailers loaded on one flatcar*

Movement between East St. Louis, Ill., and—	Route	Operating miles	Rate per shipment—plan III	Complainant's costs			Defendants' costs			
				Out-of-pocket	Fully distributed	Percent proposed rates of out-of-pocket cost	Out-of-pocket	Fully distributed	Out-of-pocket [1]	Percent proposed rates of out-of-pocket cost
				70,000 pounds			*53,000 pounds* [2]		*70,000 pounds*	
Boston, Mass.	NH, L&HR, DL&W, NKP	1,392	$600.00	$618.17	$830.34	97	$403.15	$560.68	$431.86	139
Do.	NH, PRR	1,287	600.00	553.11	742.36	108	360.92	498.30	388.07	155
East Cambridge, Mass.	B&M, D&H, DL&W Wab	1,256	600.00	.....	.....	.....	403.17	547.56	429.71	140
Springfield, Mass.	NH, L&HR, DL&W, NKP	1,299	551.00	.....	.....	.....	409.53	558.86	436.41	126
Do.	NH, PRR	1,194	551.00	.....	.....	.....	367.25	496.44	392.56	140
Hoboken, N.J.	DL&W, Wab	1,112	519.00	.....	.....	.....	361.61	485.87	385.86	135
Do.	DL&W, NKP	1,102	519.00	489.18	655.34	106	313.02	435.25	335.91	155
Jersey City, N.J.	B&O	1,102	519.00	474.79	636.04	109	349.60	466.96	372.50	139
Do.	LV, Wab	1,169	519.00	.....	.....	.....	386.06	517.65	410.47	126
Do.	LV, NKP	1,151	519.00	506.11	678.38	103	335.15	464.00	358.07	145
Kearny, N.J.	PRR	1,041	519.00	453.71	607.35	114	288.06	397.75	310.34	167
Philadelphia, Pa.	do	976	480.00	431.25	576.77	111	276.75	380.71	297.60	161
Do.	B&O	1,010	480.00	443.00	592.77	108	341.97	451.22	363.08	132
Do.	RDG, WMD, P&WVA, NKP	1,061	480.00	503.76	674.62	95	320.46	445.98	341.82	140
Baltimore, Md.	B&O	915	446.00	.....	.....	.....	312.07	412.96	331.33	135
Do.	WMD, P&WVA, NKP	964	446.00	.....	.....	.....	283.31	399.13	302.67	147
Washington, D.C.	B&O	868	446.00	.....	.....	.....	291.99	388.73	310.33	144

[1] No fully distributed costs computed by defendants.
[2] Average weight of plan III TOFC shipments handled by nine railroads during study week November 9-15, 1958.

TABLE III.—*Plan III flexi-van costs for movement of two flexi-vans loaded on one car.*

Movement	Operating miles	Rate per shipment	Complainant's costs per shipment: Out-of-pocket	Complainant's costs per shipment: Fully distributed	Defendants' costs per shipment: Net revenue per shipment [1]	Defendants' costs per shipment: Out-of-pocket	Defendants' costs per shipment: Fully distributed
Between Gibson, Ind., and—			*70,000 pounds* [2]		*56,000 pounds* [3]		
North Bergen, N.J.	938	$451.50	$382.79	$523.57	$436.80	$202.79	$312.45
Boston, Mass.	996	494.50	401.11	549.13	479.80	215.58	330.88
Springfield, Mass.	897	445.50	369.83	505.50	430.80	213.56	319.23
Selkirk, N.Y.	802	394.50	339.82	463.63	379.80	186.06	287.49
Syracuse, N.Y.	661	322.50	295.27	401.48	307.80	154.42	237.14
Rochester, N.Y.	575	282.00	268.09	363.57	267.30	143.40	217.75
Between East St. Louis, Ill., and—							
North Bergen, N.J.	1,153	519.00	450.72	618.33	504.30	241.40	371.97
Boston, Mass.	1,211	600.00	469.04	643.89	585.30	254.20	390.42
Springfield, Mass.	1,112	551.00	437.76	600.26	536.30	252.18	378.77
Selkirk, N.Y.	1,017	500.00	407.75	558.39	485.30	224.68	342.03
Syracuse, N.Y.	876	428.00	363.20	496.24	413.30	193.03	296.66
Rochester, N.Y.	790	389.00	336.02	458.33	374.30	182.01	277.2

[1] The New York Central reduced revenue by $14.70 revenue debit for payments to NYC Transport for handling flexi-van between railroad cars and van terminal.

[2] Costs based on 1957, adjusted to January 1, 1959.

[3] Average weight of flexi-van traffic loaded on one car—costs for year 1957.

TABLE IV.—*Comparison of plan IV rail rates with costs per car for shipments in two trailers loaded on one flatcar provided by the shipper*

TABLE IV.—*Comparison of plan IV rail rates with costs per car for shipments in two trailers loaded on one flatcar provided by the shipper*

Movement between Kearny, N.J. and—	Route	Operating miles	Rate per shipment—Plan III	Complainant's costs per shipment [1]			Defendants' costs per shipment [2]			
				Out-of-pocket	Fully distributed	Percent proposed rates of out-of-pocket cost	Out-of-pocket	Full distributed	Out-of-pocket [3]	Percent proposed rates of out-of-pocket cost
				70,000 pounds			*53,000 pounds* [4]		*70,000 pounds*	
Dallas, Tex.	PRR, MP, T&P	1,747	$698.00	.....	.....	.....	$359.05	$539.54	$393.28	177
Do	PRR, STLSW	1,785	698.00	.....	.....	.....	363.79	545.46	399.50	175
Do	PRR, MP	1,752	698.00	$508.32	$760.46	137	.....	.....	.....	.....
Houston, Tex.	do	1,875	739.60	.....	.....	.....	370.98	559.32	407.51	181
Do	do	1,950	739.50	551.10	828.48	134	.....	.....	.....	.....
Do	PRR, STLSW, T&NO	1,857	739.60	.....	.....	.....	387.27	578.97	424.17	174
San Antonio Tex.	PRR, MP, [illegible], MP	1,960	782.80	.....	.....	.....	403.61	606.75	441.51	177
Do	PRR, MP	1,965	782.80	554.34	833.64	141	.....	.....	.....	.....
Do	PRR, STLSW, T&NO	2,072	782.80	.....	.....	.....	421.19	630.73	462.04	169
Fort Worth, Tex.	PRR, MP	1,783	708.80	515.02	771.11	138	.....	.....	.....	.....
Galveston, Tex.	do	1,909	739.60	542.24	814.40	136	.....	.....	.....	.....
Laredo, Tex.	do	2,117	843.20	587.19	885.86	144	.....	.....	.....	.....

[1] Costs for year 1957, adjusted to wage and price level as of November 1, 1958.
[2] Costs for year 1957, adjusted to wage and price level as of January 1, 1958.
[3] No fully distributed costs computed by defendants.
[4] No movement of plan IV traffic—costs based on the average plan III weights.

TABLE V.—*Comparison of plan IV rail rates with costs per car for shipments in two trailers loaded on one flatcar provided by the shipper*

Movement between Philadelphia, Pa., and—	Route	Operating miles	Rate per shipment	Complainant's costs per shipment [1]			Defendants' costs per shipment [2]			
				Out-of-pocket	Fully distributed	Percent proposed rates of out-of-pocket cost	Out-of-pocket	Fully distributed	Out-of-pocket [3]	Percent proposed rates of out-of-pocket costs
				70,000 pounds			*53,000 pounds* [4]		*70,000 pounds*	
Dallas, Tex.	PRR, MP, T&P	1,682	$666.80	.....	.....	.....	$350.66	$525.42	$383.52	174
Do	PRR, STLSW	1,720	666.80	.....	.....	.....	355.40	531.34	389.75	171
Do	PRR, MP	1,666	666.80	$487.61	$728.86	137	.....	.....	.....	.....
Houston, Tex.	do	1,810	708.40	.....	.....	.....	362.59	545.20	397.75	178
Do	do	1,864	708.40	530.39	796.88	134	.....	.....	.....	.....
Do	PRR, STLSW, T&NO	1,792	708.40	.....	.....	.....	378.88	564.85	414.42	171
San Antonio, Tex.	PRR, MP, T&P, MP	1,895	751.60	.....	.....	.....	395.22	592.60	431.76	174
Do	PRR, MP	1,879	751.60	533.63	802.04	141	.....	.....	.....	.....
Do	PRR, STLSW, T&NO	2,007	751.60	.....	.....	.....	412.80	616.61	452.28	166
Fort Worth, Tex.	PRR, MP	1,697	677.60	494.31	739.51	137	.....	.....	.....	.....
Galveston, Tex.	do	1,823	708.40	521.53	782.80	136	.....	.....	.....	.....
Laredo, Tex.	do	2,031	812.00	566.48	854.26	143	.....	.....	.....	.....

[1] Costs for year 1957, adjusted to wage and price level as of November 1, 1958.
[2] Costs for year 1957, adjusted to wage and price level as of January 1, 1959.
[3] No fully distributed costs computed by defendants.
[4] No movement of plan IV traffic—costs based on the average plan III weights.

TABLE VI.—*Comparison of plan III rail rates with costs of shipments of 70,000 pounds for trailers loaded on two railroad-owned cars*

Movement	Route	Operating miles	Defendants' out-of-pocket costs [1]				Complainant's out-of-pocket costs [2]	
			Rate per shipment	Load	Two trailers—two flatcars	Restated cost of two trailers—two flatcars [3]	Load [4]	Two trailers—two flatcars
Between Chicago, Ill., and—				*Pounds*			*Pounds*	
Boston, Mass.	NH, L&HR, DL&W, NKP	1,192	$494.50	[5] 38,100	$439.64	$479.14	47,275	$773.74
Springfield, Mass.	do	1,099	445.50	[5] 38,100	430.66	490.66	47,275	734.14
Hoboken, N.J.	DL&W, NKP	902	451.50	[5] 40,700	321.78	356.78	47,275	583.36
Jersey City, N.J.	LV, NKP	951	451.50	[5] 42,100	345.06	375.49	47,275	604.24
Do.	B&O	997	451.50	53,000	[6] 390.26	390.63	.....	.....
Philadelphia, Pa.	do	905	412.50	53,000	[6] 375.69	376.06	.....	.....
Baltimore, Md.	do	810	398.50	53,000	[6] 338.65	339.02	.....	.....
Washington, D.C.	do	773	398.50	53,000	[6] 318.11	318.48	.....	.....
Between East St. Louis, Ill., and—								
Boston, Mass.	NH, L&HR, DL&W, NKP	1,392	600.00	[5] 38,100	504.54	548.94	47,275	858.92
Springfield, Mass.	do	1,299	551.00	[5] 38,100	495.58	565.54	47,275	819.32
Hoboken, N.J.	DL&W, NKP	1,102	519.00	[5] 40,700	386.92	431.89	47,275	668.52
Jersey City, N.J.	LV, NKP	1,151	519.00	[5] 42,100	409.90	445.22	47,275	689.38
Do.	B&O	1,102	519.00	53,000	[6] 435.88	436.25	.....	.....
Philadelphia, Pa.	do	1,010	480.00	53,000	[6] 421.33	421.70	.....	.....
Baltimore, Md.	do	915	446.00	53,000	[6] 384.31	384.68	.....	.....
Washington, D.C.	do	868	446.00	53,000	[6] 360.66	361.03	.....	.....

[1] Cost for year 1957 (for B&O costs see footnote 6).

[2] Cost for year 1957 adjusted wage and price levels November 1, 1958.

[3] Costs for B&O restated to include 37 cents omission for switching of cabooses—costs for other railroads restated to wage and price levels of January 1, 1959, and applicable costs at total origin and destination for loading, tieing down, untieing, and unloading trailers.

[4] Net loading at 70,000 pounds loaded in two trailers and handled on two flatcars, or 47,275 pounds including weight of trailer.

[5] Average net load—one trailer and contents.

[6] Cost for year 1957 adjusted to January 1, 1959, for average loading of 53,000 pounds in two trailers excluding weight of trailers.

TABLE VII.—*Comparison of plan IV rail rate with costs per car as of January 1, 1959, for shipments of 60,000 pounds in two trailers loaded on one flatcar provided by the shipper*

Mileage blocks via actual routes	Clejan—37 tons				Rail trailer					
					85-foot—47 tons			75-foot—52 tons		
	Proposed rate	Out-of-pocket	Percent out-of-pocket of rate	Fully distributed	Out-of-pocket	Percent out-of-pocket of rate	Fully distributed	Out-of-pocket	Percent out-of-pocket of rate	Fully distributed
2,200	$924	$423.67	218	$669.25	$471.53	196	$717.11	$495.45	186	$741.03
2,250	924	432.08	214	682.77	481.03	192	731.72	505.50	183	756.19
2,300	924	440.48	210	696.28	490.51	188	746.31	515.53	179	771.33
2,350	924	448.89	206	709.80	500.00	185	760.91	525.56	176	786.47
2,400	924	457.29	202	723.32	509.49	181	775.52	535.59	173	801.62
2,450	924	465.70	198	736.84	518.99	178	790.13	545.64	169	816.78
2,500	924	474.10	195	750.35	528.48	175	804.73	555.67	166	831.92
2,660	924	500.99	184	793.60	558.85	165	851.46	587.78	157	880.39
2,740	924	514.43	180	815.22	574.04	161	784.83	603.84	153	904.63

TABLE VIII.—*Comparison of out-of-pocket costs of respondents and protestants, and our restatement of the costs (70,000-pound load).*

From—	To—	Route miles	Revenue	Respondent [1]	Protestant [2]	Restated [3]	Percent revenue to restated costs
Jersey City	Chicago	997	$403.50	$253.84	$316.00	$274.50	147
Do	Cincinnati	760	317.20	203.58	262.97	219.33	145
Do	Columbus	694	267.08	189.58	247.58	203.97	131
Do	Dayton	741	317.20	199.55	258.54	214.91	148
Do	East St. Louis	1,102	469.74	276.11	343.60	298.95	157
Do	Indianapolis	870	353.72	226.91	280.64	244.94	144
Do	Louisville	887	399.00	230.51	292.56	248.90	160
Philadelphia	Chicago	905	365.75	234.33	295.59	253.09	145
Do	Cincinnati	668	290.37	184.07	241.52	197.92	147
Do	Columbus	602	232.74	170.07	226.14	182.56	127
Do	Dayton	649	290.37	180.04	237.10	193.49	150
Do	East St. Louis	1,010	431.97	256.60	322.40	277.53	156
Do	Indianapolis	778	324.38	207.40	267.16	223.52	145
Do	Louisville	795	364.67	211.00	271.12	227.48	160
Baltimore	Chicago	810	353.02	214.18	273.22	230.97	153
Do	Cincinnati	571	237.21	163.58	218.92	175.34	135
Do	Columbus	506	205.58	149.71	203.17	160.20	128
Do	Dayton	553	237.21	159.68	214.72	171.15	139
Do	East St. Louis	915	399.25	236.45	300.25	255.46	156
Do	Indianapolis	682	291.22	187.04	244.79	201.18	145
Do	Louisville	698	299.01	190.43	248.52	204.90	146
Washington	Chicago	773	353.02	206.34	264.60	222.37	159
Do	Cincinnati	534	237.21	155.65	210.29	166.72	142
Do	Columbus	469	205.58	141.87	195.14	151.59	136
Do	Dayton	516	237.21	151.84	206.10	162.54	146
Do	East St. Louis	878	399.25	228.60	291.40	246.80	162
Do	Indianapolis	645	291.22	179.19	236.16	192.57	151
Do	Louisville	661	299.01	182.58	239.89	196.28	152

[1] Using terminal cost of $42.41; car-mile cost of 13.16069 cents; ton-mile cost of 0.22988 cent.
[2] Using terminal cost of $85.84; car-mile cost of 13.99071 cents; ton-mile cost of 0.26615 cent.
[3] Using terminal cost of $42.41; car-mile cost of 14.34996 cents; ton-mile cost of 0.25513 cent.

TABLE IX.—*Comparison of out-of-pocket costs of respondents and protestants, and our restatement of the costs (50,000-pound load)*

From—	To—	Route miles	Revenue	Respondent [1]	Protestant [2]	Restated [3]	Percent revenue to restated costs
Jersey City	Chicago	997	$362.00	$229.49	.....	$247.64	146
Do	Cincinnati	760	295.60	184.68	$234.29	198.51	149
Do	Columbus	694	248.40	172.20	220.66	184.82	134
Do	Dayton	741	295.60	181.09	230.37	194.57	152
Do	East St. Louis	1,102	421.00	249.34	.....	269.41	156
Do	Indianapolis	870	324.00	205.48	257.00	221.31	146
Do	Louisville	887	356.40	208.69	260.51	224.84	159
Philadelphia	Chicago	905	332.00	212.09	.....	228.57	145
Do	Cincinnati	668	267.20	167.28	215.29	179.45	149
Do	Columbus	602	220.40	154.80	201.67	165.77	133
Do	Dayton	649	267.20	163.69	211.37	175.50	152
Do	East St. Louis	1,010	391.00	231.95	.....	250.33	156
Do	Indianapolis	778	295.60	188.08	238.00	202.24	146
Do	Louisville	795	328.00	191.30	241.51	205.77	159
Baltimore	Chicago	810	319.00	194.13	.....	208.87	153
Do	Cincinnati	571	223.60	148.94	195.27	159.34	140
Do	Columbus	506	197.60	136.65	181.85	145.86	135
Do	Dayton	553	223.60	145.54	191.55	155.61	144
Do	East St. Louis	915	357.00	213.99	.....	230.64	155
Do	Indianapolis	682	268.00	169.93	218.19	182.35	147
Do	Louisville	698	274.00	172.96	221.49	185.66	148
Washington	Chicago	773	319.00	187.14	.....	201.21	159
Do	Cincinnati	534	223.60	141.95	187.63	151.67	147
Do	Columbus	469	197.60	129.66	174.21	138.19	143
Do	Dayton	516	223.60	138.54	183.92	147.94	151
Do	East St. Louis	878	357.00	206.99	.....	222.97	160
Do	Indianapolis	645	268.00	162.93	210.55	174.68	153
Do	Louisville	661	274.00	165.96	213.85	177.99	154

[1] Using terminal cost of $40.98; car-mile cost of 13.16069 cents; ton-mile cost of 0.22988 cent.
[2] Using terminal cost of $77.39; car-mile cost of 13.99071 cents; ton-mile cost of 0.26615 cent.
[3] Using terminal cost of $40.98; car-mile cost of 14.34996 cents; ton-mile cost of 0.25513 cent.

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No. 159

IN THE

Supreme Court of the United States

October Term, 1964

COOPER-JARRETT, INC., ET AL.
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

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OCTOBER TERM, 1964, No. 159

Cooper-Jarrett, Inc., et al.

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the railroads, shippers and freight forwarders, involved in this case, move that the unanimous judgment of the district court be affirmed on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument. The names of these appellees are listed in Appendix A hereto. The opinion of the district court is reported at 226 F. Supp. 318 and is reproduced at pages 1a to 18a of the Jurisdictional Statement.

STATEMENT

This is a direct appeal from the final judgment of a district court dismissing the suit of the motor carrier appellants to set aside an order in which the Interstate Commerce Commission unanimously approved certain railroad rates, charges and rules. The Commission's decision is reported at 314 I.C.C. 5 and is reproduced at pages 19a *et seq.* of the Jurisdictional Statement.

The issues of lawfulness decided by the Commission concerned certain Plan III and Plan IV trailer-on-flat-car (TOFC)—sometimes called "Piggy Back"—services and rates. Under Plan III, the railroads hold out in their tariffs to provide TOFC services from ramps in railroad yards at specified origins to ramps in railroad yards at specified destinations. These Plan III rates apply where the shipper desires to tender his trailers or other containers, loaded or empty, to the railroad at the origin railroad terminal for movement on railroad flatcars to the destination railroad terminal. Plan III rates and services are designed to be competitive with private transportation, and the rates are therefore fixed at a level which will induce shippers to use the railroads' terminal-to-terminal service in place of the highway operation of their own tractors in intercity movement of their trailers (314 I.C.C. 9-10, 12, 17, 21; J.S. 25a-26a, 30a, 37a, 42a).

Similarly, Plan IV rates apply where the shipper tenders his flatcar, with his trailers or containers (loaded or empty) to the railroad for transportation between the rail terminals (314 I.C.C. 9-12, 22; J.S. 26a-29a, 43a-45a).

The lawfulness of TOFC rates for movement of the shippers' trailers between rail terminals has long been recognized. Contrary to the assertion by appellants that these are "new" plans (J.S. 11), the principles involved in Plans III and IV are identical in form with some of the earliest TOFC rates to come before the Commission.

In The Matter of Container Service, 182 I.C.C. 653 (1932), *Vehicle Container Rates in Southwest*, 196 I.C.C. 127 (1933), and *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 435 (1936) presented to the Commission rates and services substantially identical in all relevant respects with those at issue here.

Only Plan III and Plan IV rates and services are at issue in this appeal. However, most of appellants' contentions with respect to the alleged unlawfulness of Plans III and IV stem from the fact that some railroads contemporaneously maintain rates and services under Plan II tariffs. Plan II rates and services are for shippers who do not desire to ship their own trailers, but desire, instead, to have the railroads pick up their freight at the shipper's dock for handling in railroad trailers to the consignee's dock (314 I.C.C. 9; J.S. 25a).

The appellants challenged the validity of the Commission's order in the district court on the ground that the Plan III and Plan IV rate and tariff provisions "are unlawful *per se*" for six different reasons, one of which was abandoned on oral argument (226 F. Supp. 321; J.S. 4a-5a). The court, identifying each of these contentions by number, found them lacking in merit (226 F. Supp. 327; J.S. 18a).

The rulings of the district court in the order of its rejection of the appellants' specific contentions may be summarized as follows:

1. Sections 1(3), 1(4), 1(10) and 1(11) of the Interstate Commerce Act are not violated when services held out and rendered by railroads for Plan III and Plan IV charges are limited by the tariffs to the ramp-to-ramp services above described (226 F. Supp. 322-323; J.S. 7a-9a).

2. Section 15(13) of the Interstate Commerce Act does not limit railroads to the publication of Plan II dock-to-dock rates with specific allowances therefrom for shippers

who desire only to ship trailers between rail terminals; separate Plan III and Plan IV rates for the latter services are lawful (226 F. Supp. 323-324; J.S. 9a-12a).

3. Nothing in Plans III or IV provides for, or even suggests any "rebate, concession or discrimination" in violation of the Elkins Act or Sections 2, 3 and 6 of the Interstate Commerce Act. Moreover, the lawfulness of any ancillary services which may be rendered to a shipper apart from the services covered by the Plan III and IV tariffs "really has no bearing upon the lawfulness of the plans themselves" (226 F. Supp. 324-325; J.S. 12a-13a).

4. The Commission correctly decided that the Plan III and Plan IV rates are compensatory and "not unreasonably low or destructive of competition, either in law, or in fact" (226 F. Supp. 325-326; J.S. 13a-14a).

5. Plans III and IV, and the rates and charges thereunder, are not violative of section 418 of the Interstate Commerce Act when used by freight forwarders (226 F. Supp. 326-327; J.S. 15a-17a).

In summary, the holding by the Commission and the district court was that it is appropriate and lawful for the railroads to publish reasonable and compensatory rates for each of the particular kinds of trailer-on-flatcar services desired by the shipping public.

ARGUMENT

The Jurisdictional Statement poses six questions alleged to be raised by the rulings of the district court (J.S. 9-10). Questions 1, 2, 3 and 4, however, misstate in varying degrees the issues presented and the rulings of the court thereon. The actual rulings of the district court are so clearly in accord with the settled construction of the governing statutory provisions as to warrant the grant of this motion.

1. Appellants' Question 1 (J.S. 9) rests on a misstatement of the court's holding. Neither the court nor the Commission held, as appellants assert (J.S. 15), that carriers can limit the Commission's jurisdiction to enforce the Interstate Commerce Act by means of terms contained in tariffs filed with the Commission. Appellants themselves acknowledge this in note 1 (J.S. 15) when they find it necessary to justify the terms used in their allegation of error by stating that the "holding of the court necessarily comes down to [this] proposition." What both the court and the Commission recognized was that in a case involving the lawfulness of the rates, charges and rules pertaining to Plan III and Plan IV terminal-to-terminal services, any question as to the lawfulness of the shipper's arrangements for the ancillary services which some railroads may have provided, either prior or subsequent to the transportation covered by the Plan III and Plan IV rates under investigation, raises a purely collateral issue which does not bear upon the lawfulness of such Plan III or IV rates. The ruling of the Commission on this point reads (314 I.C.C. 45; J.S. 78a):

> "While the furnishing of services which they do not hold themselves out to perform can be the source of illegal rebating by carriers for which they are liable to prosecution under the Elkins Act, nevertheless it cannot be said that carriers are barred from publishing rates for less than a so-called complete service."

The related ruling of the district court reads (226 F. Supp. 324-325; J.S. 12a):

> "Whether or not there are actually unlawful practices being indulged in in connection with Plans III and IV TOFC, really has no bearing upon the lawfulness of the plans themselves. If the railroads rebate, discriminate, or indulge in unlawful preference, or in any other way violate the Elkins or Interstate Commerce Acts, then they certainly are subject to censure and prosecution for those violations."

The clearest proof that the Commission did not conclude that these tariffs deprived them of jurisdiction over ancillary services is that the Commission has subsequently initiated, and has recently concluded an extensive rule-making proceeding which includes, *inter alia*, the prescription of rules governing these services. See *Ex Parte No. 230 Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Services)*, 322 I.C.C. 301 (1964).

2. Appellants concede that there is no issue in this case as to whether or not the Act prevents "a railroad from maintaining both a complete and partial service, assessing lower charges for the latter." They also concede that there is no question of "the right of a shipper to supply, at his own option, . . . components of the total transportation he needs" (J.S. 22). Nevertheless, in Appellants' question 2 they contend that Sections 1(3) and 1(4) of the Act require that the rail carriers hold themselves out to furnish all facilities and all services of transportation in all instances, and that they may not maintain rates for both complete and lesser service at the same time.

Section 1(4), which imposes the duty to furnish transportation, as defined in Section 1(3), is conditioned upon the presence of a reasonable request therefor. Accordingly, it is well settled that the duty imposed by Section

1(4) is not a universal or absolute one, but is conditioned upon the reasonableness of the request, and, in general, is relative to the conditions of trade and the business of shippers. *United States* v. *Pennsylvania R. R. Co.*, 242 U.S. 208, 230 (1916). Thus, the District Court, in rejecting Appellants' contention on the point under consideration, properly noted:

> "There is no indication whatever that the rails have not furnished all services reasonably requested by the shippers, and it is to be noted that shippers, rather than protesting the plans, have intervened on their behalf. We must conclude that the plaintiffs' first contention is groundless." (226 F. Supp. 323; J.S. 8a-9a).

It has long been recognized that separate rates for varying kinds of service are lawful and that the publication of a rate for a particular service, such as door-to-door, does not make unlawful the publication of a separate and lower rate for a lesser service. For example, this Court recently affirmed, on the merits, a decision of a three-judge district court which had upheld the Commission's approval of three different sets of rates of a freight forwarder, the highest rate being for application when the shipper desired a complete service and the two other rates being for application when the shipper desired lesser services. *National Motor Freight Traffic Association, Inc. et al.* v. *United States, et al.*, 371 U.S. 223 (1962); 372 U.S. 246 (1963). The exact rates approved in that case are set out in the Commission's report in that proceeding, 306 I.C.C. 535 at 536. The two motor carrier associations who were the appellants in that case are among the appellants here, but their Jurisdictional Statement here fails to mention the decision.

3. Appellants allege error in Question 3 by claiming that the lower court and the Commission in approving the practice of maintaining both complete service rates in Plan II and partial service rates in Plans III and IV

at the same time, rendered "inoperative the provisions of Section 15(13)", the allowance section of the Act. This argument, of course, presupposes that Section 15(13) must be operative in all situations as a matter of law, an assumption for which appellants offer no support whatsoever. Appellants' contention begins and ends with the supposition that Section 15(13) provides the only permissible method of accounting for different levels of service. However, as the Commission noted, that theory was rejected in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 531 (1945) and, in fact, the motor carriers themselves have for many years adopted rate publication practices similar to those of the rail carriers here (314 I.C.C. 45-46; J.S. 78a).

The court did not hold that the maintenance of Plan II rates had any effect, one way or the other, on the pertinency of section 15(13) to Plan III or IV rates. The Court said:

> ". . . if there were only Plan II tariffs, then, of course, services performed by the shipper would have to be considered by way of published allowances credited against the Plan II tariff, but in the presence of Plan III and IV tariffs, the question of allowances has no pertinency." (226 F. Supp. 324; J.S. 11a).

Clearly, Plans III and IV stand by themselves insofar as the application of section 15(13) thereto. The reason why section 15(13) does not apply—"inoperative" is the appellants' word—to the services or instrumentalities furnished by the shipper when using such plans was fairly stated by the district court as follows:

> "[The publication by a carrier of] a lower rate for carrying freight that is brought to it by the shipper . . . is not the rendering of any service under the Act connected with the transportation so far as the carrier is concerned. Its responsibility as a car-

rier under § 15(13) of the Interstate Commerce Act, begins when the lading is delivered to it for transportation. Pennsylvania R. Co. v. Ohio Public Utilities Comm., supra. [298 U.S. 170, 175 (1936)]

• • •

"Under Plan III the carrier's responsibility does not begin until the freight is delivered to it by the shipper, and such delivery by the shipper is not a part of the transportation covered by the Act.

• • •

". . . § 15(13) is not intended to require allowances unless the service provided by the shipper is within the tariff in use in the instance under consideration. We therefore must rule against the plaintiffs in regard to their second contention." (226 F. Supp. 324; J.S. 11a-12a).

While the case cited by the district court did not involve section 15(13), the principle there laid down is directly in point in the instant case.

In *United States* v. *Baltimore & O. R. Co.*, 231 U. S. 274 (1913), this Court recognized that when the performance by a shipper of a lighterage service is not embraced by the services held out under the published line-haul rate paid by the shipper, such shipper-furnished service cannot be the basis for a section 15(13) allowance, any more than could the service of "carting their shipments to a depot or station" (p. 287), whereas the rule is to the contrary when the lighterage performed is "included in the through rate" and is a part of the through service "which the railroads [are] under obligation to perform." (p. 293)

In short, Section 15(13) is always inoperative if the carrier's obligation as defined in the applicable tariff does not include the service or facility in question. *United States* v. *American Sheet & Tin Plate Co., et al.*, 301 U.S. 402, 408 (1937).

4. Question 4 is phrased as if the district court held that the Plan III and Plan IV tariffs "invite discrimination, preference, prejudice and rebating," but, nevertheless, are not in violation of the Elkins Act or of Sections 2, 3 and 6 of the Interstate Commerce Act (J.S. 10). The fact is that the holding of the district court denies the existence of the alleged invitation, and reads:

> ". . . there is nothing in either of these *plans* which provide for, or even suggest any 'rebate, concession or discrimination'. The types of service offered are available to all who wish to avail themselves of such services, and the rates are fixed and published for the type of service selected by the shipper." (226 F. Supp. 324; J.S. 12a) (Italics in original).

The district court also said:

> "Plans III and IV rates and charges do not violate the Elkins Act or §§ 2, 3 or 6 of the Interstate Commerce Act, nor were the railroads' practices under Plans III and IV shown to be unlawful on the record before this court." (226 F. Supp. 325; J.S. 13a).

The lack of substantiality in appellants' Question 4, is further indicated by the fact that every shipper who participated in the Commission proceeding supported Plan III and Plan IV as welcome developments in the interest and to the benefit of the shipping public. Furthermore, not a single shipper interest, with one minor exception,[1] expressed any fear of injury by reason of possible discriminatory practices of railroads in violation of tariff provisions and statutory obligations. But even if they had, the existence of potential opportunities for illegal practices could not provide a legal ground for condemning Plans III and IV. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U.S. 536, 556 (1906).

[1] One Pacific Coast association of shippers objected to Plan IV on the ground "that it could not obtain flat cars nor solicit traffic for eastbound movements to avoid empty return." The Commission ruled that this difficulty did not establish unjust discrimination. (314 I.C.C. 50; J.S. 85a)

5. Question 5 is addressed to the alleged error of the district court "in holding that a highway trailer is not an instrumentality of transportation when transported by the rail carriers under [plan III and plan IV] tariffs . . ." (J.S. 10).

Ordinarily, having published a rate without qualification, the railroad is obliged, upon reasonable request, to provide whatever "instrumentalities" are necessary to perform the transportation. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428 (1940). Thus under the Plan II tariffs, the railroad contracts for a complete door-to-door service, including trailer and drayage, on a given commodity. Under the Plan III tariffs, however, the railroad only contracts to move a large package of freight for the shipper between designated ramp points, the "package" in this instance taking the form of a trailer.

It matters not from what source the shipper procures the outer package. Some own their own trailers, some lease from outside sources and some lease from railroad trailer-leasing subsidiaries. As long as the railroad does not undertake to provide the shipper's package as part of the applicable Plan III tariff undertaking, however, the package (or trailer) is not an "instrumentality" as that term is used under Sections 1(3) and 15(13) of the Act.

6. Question 6 has already been decided by this Court in a recent case, cited and followed by the lower court, but not mentioned by the appellants. Their objection in this final issue is to the holding that freight forwarders can lawfully "provide their own trailers and their own flatcars when utilizing Plan III or Plan IV TOFC transportation . . ." (J.S. 14).[2] They contend that Section 418 of the

[2] Freight forwarders assemble individual shipments received from the public, consolidate them, ship the consolidated shipment to a destination terminal (paying the railroad tariff rates for the rail haul) and then break bulk and distribute the individual shipments to the consignees. They are regulated under Part IV of the Interstate Commerce Act, 49 U.S.C. § 1000 *et seq.*

Act should have been interpreted to prohibit such shipments by forwarders (J.S. 23). However, six of these appellants urged their same interpretation of Section 418 to this Court only two years ago in opposition to the forwarders' use of Plan III transportation, and the decision was squarely against their contention. *Eastern Express, Inc. et al.* v. *United States, et al.*, 369 U.S. 37 (1962).

In that per curiam decision this Court affirmed a decision of a three-judge court for the Southern District of Indiana, 198 F. Supp. 256 (1961). The ruling as to Section 418 was that "rail shipments by the freight forwarders of their trailers, loaded or empty, under the rail Plan III piggyback rates published by the railroads and available for the use of the shipping public, are not unlawful under said section" (198 F. Supp. at 265). The affirmance by this Court determined that question of Section 418 with finality.

The lower court in the present case noted that, as to the forwarders' use of Plan III, the appellants' argument had been disposed of in the *Eastern Express* case (226 F. Supp. 326; J.S. 15a). While Plan IV rates were not directly involved in that case, the principle applies to both piggyback plans, and the court so held, approving the decision of the Commission to the same effect (226 F. Supp. 326; J.S. 15a-16a).

Neither the wording of Section 418 nor its legislative history lends any support to the motor carriers' contention, which has been rejected by this Court, the two lower courts and the Commission. Clearly the forwarders are not utilizing "the instrumentalities or services of any carriers other than common carriers by railroad . . ." (49 U.S.C. § 1018), when they tender their flatcars or trailers, loaded or empty, for transportation by the railroad. And the legislative history, part of which is described in the opinion below (226 F. Supp. 326-327; J.S. 16a and 17a), shows that the purpose of Congress in this section was to prohibit the use of contract carriers, a subject which has no relation to the present case.

CONCLUSION

Since this appeal presents no issue of substance warranting plenary consideration, the judgment of the district court should be affirmed.

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PROOF OF SERVICE

I, PAUL R. DUKE, Attorney for these Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of August, 1964, I served copies of the foregoing Motion to Affirm on the several parties as follows:

1. On the United States by mailing a copy, properly addressed, with postage prepaid to each of the following: Honorable Archibald Cox, The Solicitor General; William H. Orrick, Jr., Assistant Attorney General; Michael Freed, Attorney, Department of Justice, Washington 25, D.C.; and F. Russell Millin, United States Attorney, Kansas City, Missouri.

2. On the Interstate Commerce Commission by mailing a copy, properly addressed, with postage prepaid to each of the following: Robert W. Ginnane, General Counsel and Leonard Goodman, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On Cooper-Jarrett, Inc. et al., Appellants, by mailing a copy, properly addressed, with postage prepaid to each of the following: Kenneth E. Midgley, 1500 Commerce Building, Kansas City 6, Missouri; Thomas J. Hogan, 1450 Wabash Avenue, Terre Haute, Indiana; LeGrand A. Carlston, 4045 Pecos Street, Denver 11, Colorado; Bryce Rea, Jr., 917 Munsey Building, Washington, D. C. 20004; Roland Rice, Homer S. Carpenter, John S. Fessenden, 618 Perpetual Building, Washington, D. C. 20004.

PAUL R. DUKE

APPENDIX "A"

List of Appellees

EASTERN RAILROADS

The Baltimore & Ohio Railroad Company
Boston and Maine Railroad
The Central Railroad Company of New Jersey
Chicago, Rock Island and Pacific Railroad Company
Erie-Lackawanna Railroad Company
Fort Worth and Denver Railway Company
Illinois Central Railroad
Lehigh Valley Railroad Company
Louisiana & Arkansas Railway Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
The New York Central Railroad Company
New York, Chicago and St. Louis Railroad Company
The New York, New Haven and Hartford Railroad Company
The Pennsylvania Railroad Company
Reading Company
St. Louis-San Francisco Railway Company
St. Louis-San Francisco and Texas Railway Company
St. Louis Southwestern Railway Lines
The Texas and Pacific Railway Company
Wabash Railroad System

TRANSCONTINENTAL RAILROADS

The Atchison, Topeka and Santa Fe Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Great Northern Railway Company
Northern Pacific Railway Company
Southern Pacific Company
Union Pacific Railroad Company
The Western Pacific Railroad Company

FREIGHT FORWARDERS

The Freight Forwarding Institute
ABC Freight Forwarding Corporation
Acme Fast Freight, Inc.
American Freight Forwarding Corporation
Blue Ribbon Express, Inc.
Clipper Carloading Company
Flynn Forwarding Company, Inc.
International Forwarding Company, Inc.
Lifschultz Fast Freight
Merchant Shippers Association
Midland Forwarding Corporation
National Carloading Corporation
Ohio Fast Freight Corp.
Pacific and Atlantic Shippers, Inc.
Republic Carloading & Distributing Company, Inc.
Sheldon Forwarding Company
Springmeier Shipping Company, Inc.
The Texas Freight Company, Inc.
Universal Carloading & Distributing Company, Inc.
Western Carloading Co., Inc.
Westland Forwarding Co.

SHIPPERS

The National Industrial Traffic League
Drug & Toilet Preparation Traffic Conference
Manufacturing Chemists' Association
Merck & Company
Swift & Company

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 159

COOPER-JARRETT, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court which dismissed appellants' complaint seeking to enjoin and set aside an order of the Interstate Commerce Commission. Appellants are four common carriers by motor vehicle and four motor carrier associations. The order of the Commission which appellants seek to enjoin dismissed their complaint charging that the so-called Plan III and Plan IV trailer-on-flatcar (TOFC or

"piggyback") rates and charges of certain railroads were unlawful under the Interstate Commerce Act. *Eastern Central Motor Carriers Assn.* v. *Baltimore & O. R. Co., et al.*, 314 I.C.C. 5. The complaint also attacked the use of Plans III and IV rates by certain freight forwarders.[1]

TOFC rates and charges are not particularly new, and the current Plans III and IV have their roots in plans more than 30 years old.[2] The five plans presently offered were accurately described below (J.S. 3a–4a), and the facts are not in dispute.

Under Plan I, the applicable rates and charges are set by motor carrier tariffs in which the railroads concur. The rail carriers offer only a partial service, substituting rail for motor carrier service upon request by a motor carrier. Under this plan the railroads only transport the loaded truck trailers between rail terminals. They perform no pickup or delivery of the shipments, nor do they load or unload the flatcar.

Under Plan II, the railroad offers its service directly to the shipping public. In addition to providing the line-haul transportation, the railroad provides both the pickup and delivery service, performs load-

[1] Appellants' complaint was one of ten proceedings before the Commission which were made the subject of a single report and order. Some of the proceedings arose from motor carrier complaints, while the remainder arose from Commission investigations (J.S. 21a–24a).

[2] *In the Matter of Container Service*, 182 I.C.C. 653 (1932); *Vehicle Container Rates in Southwest*, 196 I.C.C. 127 (1933); and *Trucks on Flatcars Between Chicago and Twin Cities*, 216 I.C.C. 495 (1936).

ing and unloading, and furnishes the shipper with a truck trailer.

Under Plan III, the railroad transports a trailer supplied by the shipper and offers two of the related four services (*i.e.*, loading and unloading, but not pickup and delivery). Plan III resembles Plan II, and differs from Plan I, in that the railroad deals with the shipper directly, rather than through the motor carrier, and therefore competes, rather than collaborates, with the motor carrier.

Plan IV is identical to Plan III, except that the shipper here provides the flatcar, as well as the trailer, and is responsible for loading and unloading, as well as for pickup and delivery.

Finally, Plan V contemplates joint motor-rail service at joint motor-rail rates, both modes performing line-haul movements.

Appellants' attack is limited to Plans III and IV. First, they contend that the rail carriers cannot offer this "partial service," since they are obligated by the specific provisions of Part I of the Interstate Commerce Act to provide all facilities and services necessary to move goods from the consignor's door to the door of the consignee, and shippers may furnish no part of such facilities and services. Second, they argue that the rail carriers cannot offer Plans III and IV as separate plans, but only in the form of Plan II together with special allowances (published pursuant to Section 15(13) of the Interstate Commerce Act, 49 U.S.C. 15(13)) for those Plan II services performed by shippers. Third, they urge that Plans III and IV are inherently discriminatory,

in that they invite "preference, prejudice and rebating" (J.S. 10).[3]

After a full administrative hearing, in which a number of shippers intervened in support of the challenged plans (J.S. 8a), the Commission rejected appellants' contentions, two commissioners separately concurring and one dissenting. The district court unanimously sustained the Commission.

The district court held: (1) that nothing in the Interstate Commerce Act prevents a railroad from holding out and publishing rates for both a complete door-to-door service and for a lesser service at a lesser rate (J.S. 8a, 10a–11a); (2) that a schedule of allowances is therefore unnecessary when the shipper accepts the carrier's lesser service at the lesser rate (J.S. 11a); and (3) that the plans are open to all shippers equally and are not made unlawful merely by the motor carrier's unfounded supposition that the railroads may engage in criminal practices (J.S. 12a).[4]

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[3] Appellants also argue that it violates Section 418 of the Act, 49 U.S.C. 1018, for freight forwarders to furnish trailers and flatcars under Plans III and IV. It has been specifically held, however, that freight forwarders may utilize Plan III without violating Section 418 (*Eastern Express, Inc.* v. *United States*, 198 F. Supp. 256 (S.D. Ind.), affirmed, 369 U.S. 37); and both the Commission and the district court correctly stated that this holding is similarly applicable to the forwarder's use of Plan IV (J.S. 15a–17a, 76a). Moreover, even assuming *arguendo* that freight forwarders have improperly utilized Plans III and IV, this would not affect the legality of these plans (J.S. 88a).

[4] Appellants also argued that the rates under Plans III and IV violate the requirement that rates reflect just and reasonable classifications of property, and are so unreasonably low as to

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. It involves only the Commission's refusal—based upon well-settled principles—to hold Plans III and IV illegal because they offer less than a complete service or because some railroads offering the plans *might* illegally provide services or facilities not held out in their tariffs.

1. Relying upon Section 1(4) of the Interstate Commerce Act, 49 U.S.C. 1(4), which requires railroads "to provide and furnish transportation upon reasonable request therefor," appellants argue that Plans III and IV are unlawful in failing to provide all the services and facilities necessary to move goods from the consignor's door to that of the consignee. The district court correctly disposed of that contention by noting that a complete service is offered under Plan II, which is unaffected by the availability of a partial service at a lower rate (J.S. 8a). The statute requires the railroad to provide the full range of services and facilities only "upon reasonable request therefor"; in the case of a shipper who elects Plan III or Plan IV, no such request is made.[5]

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constitute a destructive trade practice. The former argument was abandoned on appeal to the three-judge district court (J.S. 5a), and the latter has apparently been abandoned in this Court.

[5] It was early settled that shippers may provide services in the shipment of goods by rail (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 232 U.S. 199; *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, 225) so long as there is "an increase in the rate where the loading is done in whole or in part by the carrier." *Atchison, T. & S. F. Ry. Co.* v. *United States*, 232

Appellants do not attack the partial service offered by the railroads under Plan I, but only those held out under Plans III and IV. They complain only when the railroad deals directly with the shipper, not when it deals with the shipper through appellants. Yet, the transportation service performed by a railroad under Plan III is for all practical purposes identical to that performed under Plan I (J.S. 42a). Appellants would interpret the Act to permit railroads to offer a partial piggy-back service only when motor carriers serve as intermediaries.

2. In the alternative, appellants argue that shippers may furnish part of the transportation facilities only if they are compensated in accordance with allowances published by the carrier (J.S. 9–10, 23) pursuant to Section 15(13) of the Act, 49 U.S.C. 15(13).* That contention is groundless.

As both the Commission and the district court noted (J.S. 10a–12a; 77a–80a), Section 15(13) is inapplicable to Plans III and IV because the tariff rates thereunder are based upon the premise that the carrier will not undertake responsibility for the loaded

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U.S. 199, 217. This Court has held, therefore, that a railroad may make a charge for line-haul service and at the same time publish a consolidated charge for the line-haul and an accessorial service. *Interstate Commerce Commission* v. *Detroit &c. Ry. Co.*, 167 U.S. 633 (line-haul plus pickup and delivery); *United States* v. *Interstate Commerce Commission*, 352 U.S. 158, 162–163 (line-haul plus wharfage and handling).

*That section provides in pertinent part:

"If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable * * *."

trailer or flatcar until after it is received for transportation. And the Act forbids a carrier to make an allowance to a shipper unless the service provided by the shipper is offered by the carrier under the applicable tariff. *United States* v. *Interstate Commerce Commission*, 352 U.S. 158, 172; *United States* v. *Wabash R. Co.*, 321 U.S. 403, 410, 412–413.

The provisions of the Interstate Commerce Act become applicable to a shipment only when "merchandise has been placed in the possession of a carrier." *Pennsylvania R. Co.* v. *Ohio Public Utilities Commission*, 298 U.S. 170, 175. Consequently, a carrier's tariff rates may be applied to a shipment only when the merchandise has been brought within the carrier's custody and control. *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130, 134 (C.A. 4). Any shipper dealing with a rail carrier offering TOFC service can, upon reasonable request, obtain a service under which the carrier receives, and thereby becomes responsible for, the freight at the shipper's dock or place of business (Plan II). Many shippers, however, prefer the lower rates offered by Plans III and IV, under which the carrier's custody, and hence responsibility, does not begin until the lading is delivered to it at trackside (J.S. 10a–11a). "[O]bviously," as the Commission held, "[no allowance] can be made to the shipper for performing a service the avoidance of which is the consideration for the lower rate" (J.S. 78a).

3. Appellants argue that Plans III and IV are inherently discriminatory, and thus illegal *per se*, because some rail carriers may succumb to the "in-

centive" of charging Plans III or IV rates, while supplying services in excess of those held out in the tariffs for these plans. But with any tariff there exists a possibility that a carrier will refuse to abide by its provisions and will engage in unlawful practices. If a carrier furnishes service which it does not hold itself out to perform under applicable tariffs, it may be prosecuted under the Elkins Act, 49 U.S.C. 41–43. Here, however, the record contains no evidence of discrimination, preference, or prejudice, and the plans on their face certainly do not suggest any such unlawfulness (J.S. 12a–13a, 84a–85a). And while appellants purport to defend the shippers from discriminatory rates and practices, the shippers themselves oppose appellants' position and support the decision of the Commission (J.S. 8a–9a). The Commission was clearly correct in refusing to find that Plans III and IV are unlawful simply on the basis of conjectures that the railroads may engage in criminal conduct outside their tariffs (J.S. 85a).[7]

[7] Moreover, as this Court observed in a similar context, "(t)he whole situation is subject to the power of the Commission * * * ." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 509. Recently, for example, in *Substituted Service-Charges and Practices of For Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, 415, regulations were adopted which require the railroads to publish "all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service * * * and other special services or practices * * *."

CONCLUSION

Since this appeal presents no issue warranting plenary consideration, the judgment of the court below should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 159

COOPER-JARRETT, INC., ET AL, *Appellants*

v.

THE UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal From the United States District Court For the Western District of Missouri

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

STATEMENT

Appellant. Cooper-Jarrett, Inc., and the other appellants named in Appendix A hereto oppose the Motions to Affirm the judgment of the court below.

For the most part appellants' case is adequately presented in the Jurisdictional Statement, and thus the Motions to Affirm, by their obvious misconception of appellants' arguments and misunderstanding of basic

questions presented, serve to bring into sharp focus rather than to diminish the critical importance of the issues. To simplify reference to the individual motions we will distinguish between the appellees by referring to the United States and Interstate Commerce Commission as the Government and to the remaining appellees as the intervenors.

At page 3 of the Government motion it is asserted that appellants here contend that TOFC Plans III and IV are unlawful *per se* because the provisions of Part I of the Interstate Commerce Act [49 U.S.C. § 1 et seq.] prohibits rail carriers from offering a partial service. A statement of similar import appears at page 6 of the intervenors' motion, and the Government adds to its erroneous assertion the further statement that appellants contend that shippers may not furnish any part of the facilities or services of transportation. But appellants make no such contention, fully recognizing that the railroads may lawfully perform a partial service and that shippers may furnish some portion of the facilities or equipment necessary to the transportation of their goods. Appellants' position in this case is that the railroads, having established rates for the computation of charges for the performance of a complete TOFC service, may reduce the charges to be assessed for partial services only pursuant to allowances reflecting the shippers contribution to the service published in tariffs as required by Section 15(13) of the Act [49 U.S.C. § 15(13)]. In failing to recognize the position of the appellants, both groups of appellees fail to treat the vital legal issue which this Court is here asked to decide.

While there are other misstatements in the motions of both the Government and the intervenors, only one

is of enough significance to require clarification. At page 6 of its motion, the Government attempts to equate Plan I TOFC with Plan III TOFC by suggesting that in Plan I the railroads hold out a partial service which is comparable to that named in the Plan III tariffs and that the motor carriers by opposing Plan III are attempting to limit the ability of the railroads to compete. This statement is both unfair and inaccurate. There is no legitimate similarity between Plan I and Plan III, because in Plan I the only service held out to the public is a complete door-to-door service and the holding out is for the joint performance of such service by a motor carrier and a railroad. To the extent that there is any purpose in this case in attempting to categorize the various TOFC plans, it is submitted that Plans I and V may be distinguished from Plans II, III and IV in that the first group consists of service performed by motor carriers and railroads, pursuant to a joint rate while the second group consists entirely of all-rail service offered directly to the shipping public. There is no issue in this case as to the right of any carrier to participate in or physically perform TOFC service on either a complete or a partial basis. The basic issue is whether carrier charges may be varied dependent upon shipper contribution or noncontribution to service in a manner other than that provided by law.

As is true in most important cases, the area of conflict between the parties may be stated in various ways. In the motion of the intervenors the basic issue is succinctly, if unintentionally, summarized in a fashion which fairly states not only the position of those intervenors but also that of the Government:

> "Ordinarily, having published a rate without qualification, the railroad is obliged, upon reason-

able request, to provide whatever 'instrumentalities' are necessary to perform the transportation. *General Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, 428 (1940). Thus under the Plan II tariffs, the railroad contracts for a complete door-to-door service, including trailer and drayage, on a given commodity. Under the Plan III tariffs, however, the railroad only contracts to move a large package of freight for the shipper between designated ramp points, the 'package' in this instance taking the form of a trailer.

"It matters not from what source the shipper procures the outer package. Some own their own trailers, some lease from outside sources and some lease from railroad trailer-leasing subsidiaries. As long as the railroad does not undertake to provide the shipper's package as part of the applicable Plan III tariff undertaking, however, the package (or trailer) is not an 'instrumentality' as that term is used under Sections 1(3) and 15(13) of the Act." [Intervenors motion, p. 11]

In short, the intervenors urge that the railroads should be free to "contract" their transportation services in accordance with what they elect to publish in their tariffs regardless of other tariffs applicable on the same traffic, between the same points, at the same time. Even more startling is the theory that an instrumentality of transportation acquires or loses its identity solely in accordance with the description of the services and facilities to be provided under one of two or more tariff rates for TOFC service. They go still further to insist that when such description does not include the provision of the instrumentality, a shipper may lawfully lease it from a railroad subsidiary and qualify for a rate limited to shipments in trailers furnished by shippers. The contention is diametrically contrary to the unambiguous holding of the Supreme

Court in *Railroad Ret. Bd.* v. *Duquesne Warehouse Co.*, 326 U.S. 446 (1945) wherein at pages 453-454 the Court said:

> "Duquesne's answer is that the service of loading and unloading is done by it for its customers, *that these services are rendered before railroad transportation has begun or after it has ended, that they are not and cannot be a part of railroad transportation since the tariff of the Pennsylvania forbids it from performing the services.* Duquesne's conclusion is that under such circumstances loading and unloading are not and cannot be a part of railroad transportation. *The question, however, is not whether in these cases the service of loading and unloading is being rendered by the Pennsylvania and is, therefore, in fact a part of its transportation service.* It is not whether the affiliate would itself be subject to the Interstate Commerce Act. *It is whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs.* If it is such a service, it is a transportation service within the meaning of the present Acts." [Emphasis added]

The services and the instrumentalities by which Plan III and Plan IV are converted into Plan II are just as much transportation facilities and transportation services as is the physical act of line-haul movement, are all within the regulatory reach of the Interstate Commerce Act, and may not be provided by the railroads or their subsidiaries except in full compliance with the provisions of that statute.

ARGUMENT

From the very inception of this case, these appellants have argued simply that once having elected to provide a complete service and once having published the rates and charges therefor, as the railroads have done with respect to TOFC service (Plan II), the only way that a less-than-complete service can be rendered and the shippers compensated for their contribution of the remaining instrumentalities or services necessary to complete the transportation is through allowances as provided in Section 15(13) of the Interstate Commerce Act [49 U.S.C. § 15(13)]. As is apparent from the discussion by the Interstate Commerce Commission in its original disposition of this entire matter, the issue was squarely before it and fully understood. The Commission said (J.S. 77a-78a):

> "In their reply to the railroads' exceptions, certain of the motor-carrier interests state:
>
> 'the issue here presented is simply a question of whether the means which the railroads have chosen for rendering less than a complete TOFC service are lawful.
>
> * * * * * * * * *
>
> 'It is the contention of the motor carrier protestants that in view of the provisions of the Interstate Commerce Act requiring the railroads to furnish the instrumentalities of transportation, to strictly observe their published tariff charges, and permitting them to compensate shippers through allowances published in tariff form for rendering some portion of the service which the railroads are obligated to perform, the instant proposals are unlawful.'
>
> "In substance, the examiner concluded in the proposed report in the eastern and western cases that the railroads, having established plan II rates

and charges for a complete, door-to-door TOFC service, may provide lesser services only by publishing tariff allowances to shippers who furnish a part of the instrumentalities and services which the carriers otherwise are obligated to furnish. Eastern Central insists that there is no justification for the maintenance of two sets of rates, one contemplating the provision of all instrumentalities and services and the other contemplating the furnishing of certain instrumentalities and services by the shipper.

"We are not in agreement with that position. The argument draws its principal support from evidence that under plan III and plan IV operations there has been some direct and indirect leasing of trailers and cars by certain railroads to shippers and the performance of loading and unloading of lading into and out of trailers, or of drayage services at negotiated charges. In any instances in which the carriers, having established plan II rates, performed a complete door-to-door service and charged only plan III or plan IV rates, the latter obviously were inapplicable and the railroads should collect undercharges on the basis of the applicable plan II rates and charges. While the furnishing of services which they do not hold themselves out to perform can be the source of illegal rebating by carriers for which they are liable to prosecution under the Elkins Act, nevertheless it cannot be said that carriers are barred from publishing rates for less than a so-called complete service. Many motor carriers, for example, publish rates subject to consignor loading and consignee unloading which services are normally included in motor rates. The fact that rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a lower rate. Nor, when that is done, can it be said that the carrier is 'obligated' to do more than it has offered to do for the lower rate where such

> offer at the latter rate is accepted by the shipper. With respect to 'allowances,' obviously none can be made to the shipper for performing a service the avoidance of which is the consideration for the lower rate."

Throughout the motion of the Government as well as that of the intervenors it is apparent that those parties fail to perceive that there is a distinction between a rate and a charge, and this failure on their part perhaps explains the misconception of the arguments of these appellants and of the importance of the issues in this case. Thus, at page 6 of their motion, the intervenors appear to suggest inconsistency in the position of appellants by referring to appellants' statement that a railroad may maintain both a complete service and a partial service, assessing lower charges for the latter, and in the same paragraph insisting that appellants' argument here is that the rail carriers must hold themselves out to furnish all facilities and all services of transportation in all instances. The latter portion of the intervenors' statement is incorrect for what the appellants have consistently argued throughout the case is that charges for the two services, i.e., the complete service and the partial service, must stem from the same rate. That is to say, the charges for the complete service are computed by application of the appropriate rate to a particular shipment and, if the requirements of the Act are to be met, the charges for the incomplete service must be computed in the same manner less whatever allowance is provided to reflect the performance by the shipper of a part of the complete service. To finally eliminate any lingering vestiges of misunderstanding, it should be noted that these appellants do not contend that the railroads must offer a complete door-to-door TOFC service.

References herein to complete service are based upon the fact that the railroads have elected to offer such service, and appellants simply insist that having done so, lesser charges for variations thereof may be accorded shippers only pursuant to the provision of the Act adopted by Congress for that very purpose.[1]

The proper resolution of the basic issue raised in this case is of tremendous importance as can readily be perceived by placing in juxtaposition two statements of the Commission in its report. First, in defining Plan III the Commission said:

> "Under plan III service, the shipper provides the trailers (or containers) which he owns or leases. He delivers the loaded trailers to the rail loading ramp and arranges for their movement from the unloading ramp at the delivery point. The railroad loads the trailers onto the flatcar at origin, performs the line-haul service, and unloads the trailers from the flatcars at the rail terminal. The railroad charge is stated in amounts per flatcar, a charge of the same amount applying in the opposite direction, whether the trailers are empty or loaded. *Plan III thus eliminates pickup and delivery expense, acquisition, maintenance, and depreciation charges for trailers and all empty return mileage.* The railroad pays no rental charge for the trailers, and no refrigeration, ventilation, or other protective services are furnished." [J.S. 25a. Emphasis supplied]

That the foregoing description has almost no relevance to the actual practice of the railroads under

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[1] For any generic type of service, i.e. boxcar, TOFC, etc., appellants contend that only one rate—that for the most complete service offered—may be maintained. Charges for variations thereof may be adjusted by allowances from the rate.

Plan III is plain from the further finding of the Commission:

"*Other services.*—Several railroads, including the Pennsylvania, Baltimore & Ohio, The Atchison, Topeka and Santa Fe Railroad Company, and Chicago, Burlington & Quincy Railroad Company, have performed for freight forwarders the loading and unloading of lading into and out of trailers moved in plan III or plan IV service. Several eastern railroads, including the New York Central, Pennsylvania, Lackawanna, Nickel Plate, Lehigh Valley, and Baltimore & Ohio, have leased, either directly or indirectly through subsidiaries, trailers or flexi-vans on a trip-lease basis to shippers, including freight forwarders and shipper associations. In addition, some railroads, including the New York Central and Pennsylvania, either directly or indirectly through subsidiaries, perform the cartage of the trailers between the shippers' places of business and the railroads' ramp locations. The railroads have found that the utilization of their trailers in plan III service through trip-lease arrangements has had the effect of reducing their empty trailer-miles, as it enables the 'interweaving' of plan II and plan III trailer utilization. The reduction results principally because the railroads, including their subsidiaries, generally lease only their surplus trailers, and, as in the case of the Pennsylvania, only to shippers desiring to make use of the trailers to destinations at which the Pennsylvania wants them.

"In addition to the trip lease of trailers by the railroads, including their subsidiaries, to shippers for use in plan III, the Lackawanna has trip leased the trailers of a shipper, Swift and Company. The traffic of the latter moves eastbound only, and to avail itself of plan III service it has leased trailers both on a trip-lease basis and on a round trip basis. When the leases are on a round trip basis it has

subleased the trailers to the Lackawanna also for the return westbound movement." [J.S. 33a-34a]

It may be here observed that the illegality inherent in Plans III and IV does not lie in the quantum of physical service rendered or not rendered, but rather in the holding out to the public of this limited or truncated TOFC service independent of and concurrent with the holding out of complete TOFC service. In this situation, when the truncated service is converted into a complete service through the provision of the necessary additions either directly by the railroads or through their subsidiaries, there is a manifest ability to manipulate rates and charges by assessing either the complete service rate or the truncated service charge plus some assessment for the rail-furnished additions. And it is here that the practical vice is found. The opportunity for discriminatory practices is not only too great to resist but it is also so intimately related to daily operating routine as to become a virtual part thereof.

The Commission itself perceived the vice inherent in the maintenance of rates for a type of service and the concurrent maintenance of an unrelated rate for a variation of that type of service when it found that:

> "* * * In any instances in which the carriers, having established plan II rates, performed a complete door-to-door service and charged only plan III or plan IV rates, the latter obviously were inapplicable and the railroads should collect undercharges on the basis of the applicable plan II rates and charges. While the furnishing of services which they do not hold themselves out to perform can be the source of illegal rebating by carriers for which they are liable to prosecution under the Elkins Act, nevertheless it cannot be

> said that carriers are barred from publishing rates for less than a so-called complete service. * * *" [J.S. 78a]

The serious deficiency in the Commission's decision, which is compounded by the court below and which permeates the arguments of the appellees, is that railroads do hold themselves out to provide all instrumentalities and perform all services necessary to a complete door-to-door TOFC transportation. That is to say, the Plan III and IV charges which are the direct subject of the case cannot be considered in isolation but must be evaluated in light of the transportation context of which they are a part. As an abstract proposition it may well be that carriers are not barred from publishing rates for a less-than-complete service, but in this case the carriers *have* published rates covering complete service and the vital question is whether they may *also* concurrently publish separate and unrelated rates for a part of that service in a fashion other than that specified in the Act itself.

There is no question but that a shipper may perform some part of a transportation service and there is no question but that when he does so the total charge assessed therefor by a carrier may be less than the charge which would be assessed if the carrier performed the entire service. But this does not mean that the carrier may maintain completely separate rates with one schedule applying for the complete service and a different schedule for the partial service. Section 15(13) of the Act [49 U.S.C. § 15(13)] explicitly provides that when a shipper furnishes a part of a transportation service his compensation therefor shall be published as an allowance or deduction from the rate which would otherwise be applied by the carrier

to compute the charge for the service. To hold, as did the Commission and the court below, that Section 15(13) has no application because the tariffs naming the Plan III and IV charges limit the railroads' holding out so that no allowance could be made for the furnishing of trailers or of pick-up and delivery service because they are beyond the transportation obligation of the carriers where such obligation is accepted and established by the Plan II tariffs is to hold that the railroads may depart from the requirements of the Act and may indulge in preference, prejudice, discrimination, and rebating by simply publishing appropriate provisions in some one or another of their tariffs. If this be the present state of the law it is imperative that it be so declared by this Court for the thousands of carriers engaged in the performance of transportation under the Interstate Commerce Act are entitled to know that they need no longer concern themselves with adhering to the explicit commands of that Act.

The very findings by the Commission that under Plans II, III, and IV, shippers look to the railroads or their subsidiaries for the provision of trailers and pick-up and delivery services are demonstrative of the complete frustration of Congressional purpose which must occur if the component parts of a transportation service are considered as subject to regulation under one tariff but not so subject under another tariff. And it does not aid appellees' cause for them to say (Government's motion page 8, intervenors' motion page 6), that because the Commission in a later proceeding has endeavored to assert jurisdiction over the "ancillary" equipment and services necessary to convert partial TOFC service into complete TOFC service the Com-

mission did not err in the decision here under review. The fact of the matter is that the Commission's own discussion in Ex Parte No. 230, *Substituted Service—Piggyback*, 322 I.C.C. 301 (1964)[2] is convincing that the publication of separate rate schedules for the performance of various degrees of TOFC service instead of the maintenance of a single rate schedule with reductions therefrom for the performance of lesser service will utterly thwart achievement of the very purposes underlying the regulation of transportation. At pages 369-370, the Commission said:

> "* * * *Under present rate publication practices, it would be possible for a railroad to offer what amounts to exactly the same service in a variety of ways.* A shipper wishing to use TOFC service obviously expects the railroad to provide the line-haul transportation. Let us assume a situation in which such a shipper also expects the railroad to provide the trailer, but plans itself to load the trailer and to move it to the railroad's TOFC terminal. It expects the railroad to perform the necessary loading, securing, and unloading of the trailers, and it also wishes the railroad to deliver the trailer to the consignee's door and to unload it. This shipper might well be able to obtain the service it wants under two separate rates: a door-to-door rate (plan II) minus allowances for shipper loading and drayage at origin; or a ramp-to-ramp rate (plan III) plus charges for the railroad's providing the trailer and drayage and unloading at destination.
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> "It is apparent that this state of affairs places a preminum [sic] on a shipper's having a sophisti-

[2] The decision has been appealed by the railroads to the United States District Court for the Northern District of Illinois in Civil Action No. 64C-1442, *Atchison, Topeka & Santa Fe Railway Co. et al. v. United States and Interstate Commerce Commission.*

cated traffic department, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment. We think that carriers should be encouraged to use as simple a method of tariff publication as possible, *and should be discouraged from permitting the kind of situation illustrated. It is also clear that the general practice by which railroads and their affiliates trip lease trailers to shippers for immediate use in TOFC service contains potential seeds of discrimination.* Unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the Elkins Act." [Emphasis supplied]

Inasmuch as appellees have referred to the Commission's decision in Ex Parte No. 230 it is worthy of note that in that case, in contrast with the decision here, the Commission said that the transportation services held out to the public by a carrier are not determined by the words of a particular tariff alone and that whatever a carrier in fact does for a shipper becomes a part of its transportation service and thereby subject to the requirements of the Act. At pages 370-371 the Commission said:

"We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensibly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other 'accessorial' services, we think that it is *in fact* holding out a complete

door-to-door service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what it considers to be transportation services and what it considers nontransportation services.[3] This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles. Such services, we believe, will normally be transportation services when offered in connection with TOFC transportation."

What the Commission overlooked in Ex Parte 230, and refused to recognize in the decision here under review, is that when the railroads hold out a complete service at one rate and a partial service at a completely different and unrelated rate and offer to supplement the partial service with the equipment and services necessary to accomplish the complete service, they effectively establish a common carrier holding out to do exactly the same thing for two different charges and this, appellees respectfully submit, is a blatant viola-

[3] The thrust of the decision below is that the carriers' tariffs conclusively determine the question. [J.S. 8a-12a]

tion of the Interstate Commerce Act.[4] This is also the reason that Section 15(13) [49 U.S.C. § 15(13)] provides *the* method by which the charges of carriers may be varied to reflect performance by a shipper of some portion of the service which the shipper may lawfully call upon the carrier to perform.

Contrary to the assertions of the appellees, this case presents a vital issue of first impression, for heretofore no decision has interpreted the Interstate Commerce Act as permitting any carrier to apply different charges for the same services dependent upon which of two tariffs it chooses to utilize.[5] Neither has any decision interpreted the Act as permitting a reduction in a charge where the amount of the reduction bears no relationship to the only facts which warrant its imposition, i.e. performance by a shipper of a part of the service. Intervenors, at page 7 of their motion, refer the Court to *National Motor Freight Traffic Associ-*

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[4] See Section 6 of the Act [49 U.S.C. § 6] requiring the establishment of *a* rate for *a* service and the assessment of *that* rate and no other.

[5] Neither of the cases cited by the Government at page 6 of its motion (footnote 5), *Interstate Commerce Commission* v. *Detroit & C. Ry. Co.*, 167 U.S. 633 and *United States* v. *Interstate Commerce Commission*, 352 U.S. 158, stand for the proposititon that a carrier may simultaneously maintain a single rate which includes line-haul and accessorial services and separate charges for line-haul and the same accessorial services. Neither does the decision of the Commission in *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 531 (1945), cited by intervenors at page 8 of their motion and referred to by the Commission in its decision (J.S. 78a) stand for the proposition that one carrier may maintain different rates for different levels of the same service. In that case the issues grew out of rail rates which did not include pick-up and delivery service that were lower than motor carrier rates which did include such service.

ation, Inc., et al. v. *United States, et al.*, 371 U.S. 223 (1962) and 372 U.S. 246 (1963) and declare that in that case three different sets of rates were approved for a freight forwarder where the highest rate applied for complete service and the other two rates for lesser services. Reference to the decision of the Interstate Commerce Commission (306 I.C.C. 535, and 311 I.C.C. 773), which was sustained by this Court, in the foregoing case discloses that the freight forwarders there involved had established a single set of rates and were proposing a schedule of reductions from those rates to reflect the performance of certain services by the shippers themselves. Those reductions were in effect allowances within the meaning of Section 415 of the Interstate Commerce Act [49 U.S.C. § 1015], the counterpart for freight forwarders of Section 15(13) [49 U.S.C. § 15(13)] which applies to railroads. The decision in the *National Motor Freight* case turned upon issues which are not here involved, but it is abundantly clear that the case *does not* stand for the proposition that a regulated carrier may maintain different rates for a complete service and for portions of that service.

One final matter requires comment. The intervenors insist that the issue of whether or not Plans III and IV violate Sections 2, 3, and 6 of the Interstate Commerce Act [49 U.S.C. §§ 2, 3, 6] and the Elkins Act [49 U.S.C. § 41] because preference, prejudice, discrimination and rebating are inherent therein is of no importance because the court below concluded that the plans themselves do not include such practices and are offered to all shippers who wish to take advantage thereof. But the fact that the court below reached an erroneous conclusion does not render the issue unimportant. Rather, it makes it imperative that the issue

be correctly decided. While the Plan III and IV tariffs do not include within their four corners affirmative provisions for preference, prejudice, discrimination or rebates, the question posed cannot be decided on such an isolated basis. Those tariffs name charges for TOFC service which are a part of the general railroad rate structure which also includes rates for complete TOFC service. The railroads having equipped themselves to perform complete service, and the Commission having made findings of fact that in connection with Plan III and IV charges the railroads do furnish equipment and service not covered by those charges, it is sheer sophistry to hold that opportunities for preference, prejudice or discrimination are not inherent in the tariff publications.

Moreover, it is clear that the fragmentation of charges for TOFC service between Plan II tariffs, Plan III tariffs and Plan IV tariffs, is diametrically opposed to the purpose underlying the Interstate Commerce Act which is to forbid *all* schemes, plans or devices by which discrimination, preference, prejudice or rebates might be accomplished.[6] As this Court said in *United States* v. *Baltimore and Ohio R. Co.*, 333 U.S. 169, 175 (1948):

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out dis-

[6] *Cleveland, C.C. & St. L. R. Co.* v. *Dettlebach*, 239 U.S. 588 (1916); *Southern R. Co.* v. *Prescott*, 240 U.S. 632 (1916); *Union Pacific R. Co.* v. *Goodridge*, 149 U.S. 680 (1893); *Louisville & N. R. Co.* v. *Mottley*, 219 U.S. 467 (1911); *Louisville & N. R. Co.* v. *United States*, 282 U.S. 740 (1931); *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940); and *Kansas City S. R. Co.* v. *United States*, 282 U.S. 760 (1931).

> criminations of all types. New York v. United States, 331 U.S. 284, 296, and language of the broadest scope has been used to accomplish all the purposes of the Act. United States v. Pennsylvania R. Co., 323 U.S. 612, 616. It would be strange had this legislation left a way open whereby carriers could engage in discriminations merely by entering into contracts for the use of trackage. In fact this Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts, even though the contracts were executed before enactment of the legislation. See Philadelphia, B. & W. R. Co. v. Schubert, 224 U.S. 603, 613, 614; Louisville & N. R. Co. v. Mottley, 219 U.S. 467, 483, 485, 486."

It would indeed be strange if the Interstate Commerce Act had left a way open whereby carriers could engage in discrimination merely by entering into separate tariff contracts for the provision of facilities and services with some shippers while requiring others to accept a single contract and a single published tariff rate. Yet the Commission and the court below have found that such a door is open. It is therefore of the utmost importance for this Court to now declare with finality whether the Interstate Commerce Act is as totally ineffective as the decision below would render it.

CONCLUSION

Appellants respectfully submit that the questions posed by the decision below are of extreme public importance and require plenary consideration by this Court. Therefore, appellants request that the Motions to Affirm be denied.

Respectfully submitted,

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September 8, 1964

APPENDIX A

APPELLANTS

COOPER-JARRETT, INC.

EASTERN EXPRESS, INC.

EASTERN MOTOR DISPATCH, INC.

KRAMER BROS. FREIGHT LINES, INC.

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.

THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC.